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Bruce L. Benson	Enforcement of Private Property Rights in Primitive Societies: Law without Government
Hans-Hermann Hoppe	Fallacies of the Public Goods Theory and the Production of Security
David Osterfeld	Anarchism and the Public Goods Issue: Law, Courts, and the Police
Antony Flew	The Philosophy of Freedom
Murray N. Rothbard	World War I as Fulfillment: Power and the Intellectuals

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CONTENTS

Bruce L. Benson	1	Enforcement of Private Property Rights in Primitive Societies: Law without Government
Hans-Hermann Hoppe	27	Fallacies of the Public Goods Theory and the Production of Security
David Osterfeld	47	Anarchism and the Public Goods Issue: Law, Courts, and the Police
Antony Flew	69	The Philosophy of Freedom
Murray N. Rothbard	81	World War I as Fulfillment: Power and the Intellectuals

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The Journal of Libertarian Studies, Vol. IX, No. 1 (Winter 1989)

Enforcement of Private Property Rights in Primitive Societies: Law without Government

by Bruce L. Benson

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If law exists only where there are state-backed courts and codes, then every primitive society was lawless.[1] Indeed, one widely held definition or "theory" of law is that "the rule of law simply means the 'existence of public order.' It means *organized government*, operating through the various instruments and channels of *legal command*. In this sense, all modern societies live under the rule of law [but primitive societies did not]."[2] This definition of law characterizes the legal positivist school of legal theorists and dominates the economics profession. Even strongly market-oriented economists typically note that the market can function effectively only within a system of well-defined and enforced private property rights and that government is therefore needed to establish and enforce these "rules of the game." Any economist who would even question that law and order are necessary functions of government is likely to be considered a ridiculous, uninformed radical by most of the rest of the profession. For example, Bernard Herber, in a typical public finance textbook, writes

> The . . . function . . . of providing domestic stability in the form of law and order and the protection of properly . . . could be logically opposed only by an avowed anarchist. Since . . . [law and order is] not [a] controversial function of government, . . . [it does] not require a lengthy analysis in the effort to construct an economic case for the existence of a public sector for resource allocation purposes.[3]

Author's Note: I was able to undertake this project because of support from the Institute for Human Studies, which provided me with an F. Leroy Hill Fellowship. The paper extends and consolidates work begun in a forthcoming book on *Liberty and Justice: Alternatives in the Provision of Law and Order* with support from the Pacific Institute for Public Policy Research. I wish to thank Pacific Institute reviewers and particularly Randy Barnett for very helpful comments and suggestions.

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Although I would not call myself an avowed anarchist, I would suggest that it is time for a "lengthy analysis" of the case for *and* against the public production of law and enforcement.

One place to begin an analysis of the case for public provision of law and order is with an examination of the anthropological literature on primitive legal systems. These systems have been particularly troubling for the legal positivists because they apparently represent examples of law and order without a state government. They should be just as troubling for those economists who assume that the state must establish and enforce private property rights. As F. A. Hayek suggested,

> What we know about . . . primitive human societies suggests a different origin and determination of law from that assumed by the theories which trace it to the will of a legislator. . . . legal history proper begins at too late a state of evolution to bring out clearly the origins. If we wish to free ourselves from the all pervasive influence of the intellectual presumption that man in his wisdom has designed, or even could have designed, the whole system of legal or moral rules, we should begin with a look at the primitive . . . beginnings of social life.[4]

That is precisely what shall be done.

Primitive systems have been studied extensively by anthropologists and legal scholars. What can an economist add that has not already been said? The following examination will emphasize institutions and incentives that influence the provision of law and its enforcement. This emphasis is the contribution economists can make to the broad subject of law and order.[5] Some may contend that law is not an appropriate subject for economic analysis because law is not produced and allocated in exchange markets.[6] To be sure, economics has much to say about market institutions, but its relevance and scope are not so narrow. Economic theory requires only that scarce resources must be allocated among competing uses. Clearly, police services, court time, and all the other inputs into the process of law and order are scarce and must be allocated. Beyond that, economic theory explains human behavior by considering how individuals react to incentives and constraints. A well-defined set of behavioral assumptions underlies such analysis, and institutions—including but not exclusively restricted to market institutions—both provide and are created in response to the incentives and constraints.

Primitive socities have often been analyzed from an economic perspective. For example, Baden, Stroup, and Thurman have examined the resource management incentives of various American Indian tribes,[7] while Demsetz has explained the incentives to establish property rights and applied his analysis using examples from American Indian history.[8] Johnsen has explored the formation and protection of property rights among the Kwakiutl Indians.[9] The present discussion follows the lead of these studies, but goes beyond their emphasis on incentives and property right formation to discuss the *legal institutions* formed for the enforcement of rights. Although in this regard it is similar to work by Friedman on the medieval

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Icelandic legal system,[10] it emphasizes relatively more primitive systems *and* develops a *generalizable characterization* of privately produced legal systems in the context of both economic and legal theory. In this sense it is closer to Posner, but the emphasis is different, as are many of the conclusions.[11] Posner clearly demonstrated that examination of primitive legal systems from an economic perspective reveals that private sector institutions are capable of establishing strong incentives that lead to effective law making and law enforcement. Here, however, it is emphasized that the costs of violence and the benefits of order in primitive societies were enough to induce the establishment of recognized rules of conduct with emphasis on individual rights and private property—that is, the type of laws necessary for maintenance of a free market system in more complex societies. Furthermore, voluntary participatory *mechanisms to enforce* those rules, *to adjudicate* disputes, and in contrast to Posner, *to allow for further legal growth,* also developed.

The presentation that follows is divided into six sections. First, the concept of law as defined by legal scholars and anthropologists is explored. Second, the concept of government is briefly examined. Then three sections are devoted to separate examination of three primitive societies as described in several anthropological studies in order to establish the general character of privately produced legal systems. Finally, concluding remarks are presented in the sixth section.

I. The Concept of Law

Malinowski defined law from an anthropologist's perspective as "the rules which curb human inclinations, passions or instinctive drives; rules which protect the rights of one citizen against the concupiscence, cupidity or malice of the other."[12] This definition suggests that a society in which customs and social mores are widely accepted and obeyed has a legal system even with no state government, written constitution, or codes. Morality and law would appear to be synonymous. Legal theorist Lon Fuller, however, differentiated between these concepts:

> Morality, too, is concerned with controlling human conduct by rules . . . how, when we are confronted with a system of rules, [do] we decide whether the system as a whole shall be called a system of law or a system or morality. The only answer to that question ventured here is that contained in the word "enterprise" when I have asserted that law, viewed as a direction of purposive human effort, consists in the "enterprise of subjecting human conduct to the governance of rules."[13]

Thus, Fuller's definition of law includes more than simply the existence of social mores defining rules of behavior. There must be an "enterprise," and it is "precisely because law is a purposeful enterprise that it displays structural constancies. . . ."[14] The enterprise of law generates the mechanisms of enforcement, change, and dispute resolution.

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Fuller's concept of law corresponds more closely to the view of law proposed by the anthropologist Redfield, for example, than to Malinowski's. Redfield defines law as "a system of principles and of restraints of action with accompanying paraphernalia of enforcement."[15] The "paraphernalia" clearly constitute the "structural constancies" that are the manifestations of Fuller's legal enterprise.

Primary vs. Secondary Rules

Another way to distinguish between the definitions of law proposed by anthropologists like Malinowski and Redfield is to draw upon legal positivist H.L.A. Hart's discourse on "primary" and "secondary" rules.[16] Hart observed that

> it is, of course, possible to imagine a society without a legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is the general attitude of the group towards its own standard modes of behavior in terms of . . . rules of obligation. . . . we shall refer to such a social structure as one of primary rules of obligation.[17]

Hart contends that for a society to function with primary rules alone, it must be small and "closely knit by ties of kinship, common sentiment, and belief," or "such a simple form of social control must prove defective and will require supplementation in different ways."[18]

This brings us to secondary rules designed to remedy the defects that must arise, according to Hart, as a society becomes too large or diverse to function with only primary rules. Hart discussed three defects that he felt were likely: (1) "*uncertainty,*" which occurs if only primary rules exist, so when "doubt arises as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt";[19] (2) the "*static* character" of primary rules, which include "no means . . . of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones";[20] and (3) "*inefficiency,*" because "Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally and authoritatively the fact of the violation."[21] Each of these three defects can be remedied, Hart suggested, by supplementing primary rules with secondary rules, and the "remedies together are enough to convert the régime of primary rules into what is indisputably a legal system."[22]

Hart defined his secondary rules as follows:

1. The *rule of recognition* specifies "some feature or features possession of which by suggested rules is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[23] Hart suggested that such a rule could take a wide variety of forms, although his examples

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and discussion emphasized written documents and implied recognition of a state-like authority.

2. The *rules of change* establish the means by which rules are enacted through legislation, judicial precedent, royal decree, or any number of other possible procedures.

3. The *rules of adjudication* empower "individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[24]

At first glance it appears that Hart's distinction between primary and secondary rules is simply another way of stating Fuller's distinction between morality and law. The rules a primitive society are governed by may come from custom or social mores (primary rules), but for that society to have a legal system there must be an "enterprise" that results in an authoritative enforcement mechanism, a system of dispute resolution, and presumably a means of changing rules to meet the changing needs of the society (secondary rules). Very substantial differences exist between Fuller's and Hart's concepts of law, however. Hart's perception of the law falls under the legal positivist umbrella, which typically identifies law with the legal institutions that are observed (generally the state). Fuller, on the other hand, has an evolutionary (or "natural law") perspective. The differences between these views and these, their leading exponents, spawned a long running debate of classical proportions in the legal literature. This Hart-Fuller debate, while interesting and important, need not be detailed here, although one aspect of it is emphasized below. Rather, Hart's points about the uncertainty, static character, and inefficiency of a primitive society's law once that society become relatively large or diverse will be used to provide focal points in developing the following discussion of primitive law. It will be argued that many (probably all) primitive societies in the context of their enterprise of subjecting certain human conduct to control—that is, in the application of primary rules—naturally chose to establish mechanisms that alleviated the defects of uncertainty, static character, and inefficiency as they arose—or, in other words, to establish secondary rules.

The claim made here and demonstrated below that *primitive legal systems had secondary as well as primary rules* departs sharply from the conclusions reached by the legal positivist school. One can infer from Hart, for instance, that primitive societies generally lacked the secondary rules that designate authority to identify primary rules and to adjudicate disputes.[25] This view of primitive societies provides the means by which legal positivists claim that state government is a prerequisite for law and yet recognize that primitive societies functioned without such government. Primitive societies supposedly had only primary rules, while a "true" legal system requires secondary rules that must be established by the state.[26]

One particular aspect of the Fuller-Hart debate requires discussion before we can proceed. In the context of this presentation, a major source of divergence arises in Fuller's interpretation of Hart's specification of his secondary rule of

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recognition. Fuller concluded that this rule implies *absolute authority,* which cannot be withdrawn even when that authority is abused.[27] Fuller's interpretation of Hart's rule of recognition is tempered considerably for our purposes. As Hayek explained,

> law may be gradually articulated by the endeavors of arbitration of similar persons called in to settle disputes but who have no power of command over the actions on which they have to adjudicate. The questions which they will have to decide will not be whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they correspond to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.[28]

This view of authority also characterizes Fuller's concept of law. He wrote, "there is no doubt that a legal system derives its ultimate support from a sense of its being 'right'. . . . this sense, deriving as it does from tacit expectations and acceptances. . . . "[29] With the view of law and authority suggested above in mind, let us now turn to an examination of the concept of government.[30]

II. The Concept of Government

The concept of government may be even more difficult to define than the concept of law. One might define government to mean the enterprise of or mechanisms for law enforcement, in which case the legal positivist argument would simply be inverted: If there is law, there is government. But that is certainly not the popular perception of government, nor is it the view held by the legal positivists (or most economists, for that matter). After all, Hart indicated that a society could exist without government institutions.[31]

It has been suggested that one way to distinguish a governmental from a nongovernmental social arrangement is that government induces cooperation through coercion, while privately arranged cooperation is achieved through persuasion. The line between cooperation and persuasion is not a clear one, however. The fact is that any property rights system is ultimately backed by a threat of force and violence.[32] This is clearly the case in the primitive systems discussed below. Property rights systems require enforcement, and they cannot be enforced if there are no incentives to accept their authority. The relative level of coercion certainly is a factor to consider in defining government, but it is not the only factor.

Another suggested distinction between government and nongovernment is that a private agreement to transfer property requires *unanimous* consent of all parties involved, while less than unanimity (e.g., a majority vote, a majority vote of

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elected representatives, or the decision of a king or dictator) is required for a transfer when a government is involved. This argument is related to the coercion/persuasion definition, of course, and it is not completely satisfactory for similar reasons. For example, we shall see that while voluntary contractual agreements provided the basis for some primitive legal systems (also for some medieval systems, such as those in Iceland[33] and Ireland[34]), kinship provided the basis for still others. People do not necessarily unanimously agree to be in or contribute to production by their families, however, and it is not clear that leaving a primitive kinship group was easily or safely (and clearly not costlessly) accomplished.

Because the coercion and lack of unanimity definitions of government are not completely satisfactory, a definition of government is adopted here that emphasizes the institutions that perform the functions of law production and enforcement—that is, the institutions that legislate, execute, and adjudicate. In particular, government exists when these institutions are professionalized in such a way that (1) the primary source of income for some or all of the individuals who perform the legal functions is derived from those functions, and (2) some or all of the individuals involved in the production and enforcement of laws are "bureaucrats" in the sense that their coercive powers are *directly* derived through some system other than unanimous agreement of the parties affected by their actions (e.g., by royal appointment or appointment by an executive who has either been nonunanimously elected or risen to authority through force). The institutional characteristics of modern nation-states and their monarchal predecessors thus imply the existence of government.[35] This view of government implies that many of the characteristics of modern market economies evolved while government was evolving.[36] Simultaneous evolution does not imply that state government and its laws are necessary for the evolution of commercial law, however, and we shall see that they are not necessary for the establishment of private property and individual rights.[37]

III. Primary and Secondary Rules Among the Yurok Indians and Their Northern California Neighbors

Walter Goldsmidt, after studying the Yurok, Hupa, and Karok Indians and some of their Northern California neighbors, reported ". . . a culture which reflects in surprising degree certain structural and ethical characteristics of emergent capitalistic Europe."[38] In this Indian society, property was universally held in individual private ownership. Socially, these Indians were organized in households and villages. There were no class or other inalienable group affiliations, and no vested authoritarian position—that is no state-like government with coercive power.

Private property rights were sharply defined. Title considerations, for example, included (1) separation of title to different types of products; (2) ownership rights

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within the territory of an alien group (e.g. Hupas owned property inside Yurok territory); and (3) the division of title between persons (e.g., a fishing place could be owned by several people and its use divided so that one person used it one day, another the next, and so on). Ownership was complete and transferable. Exchange was facilitated by a monetary system.

The emphasis on private property may seem surprising to those who think of tribal society as some sort of socialist or communal system. On the contrary, however, private property rights are a common characteristics of primitive societies; they constitute the most important primary rules of conduct.[39] After all, as explained in detail below, law enforcement (secondary rules of recognition and adjudication) arose through *voluntary* cooperative arrangements. Voluntarily recognition of laws and participation in their enforcement is likely to arise *only when substantial benefits from doing so can be internalized by each individual.* That is, individuals require incentives to become involved in the legal process. Incentives can involve rewards (personal benefits) or punishment. Punishment is frequently the threat that induces recognition of law established by a coercive government, but when there is no government, incentives are largely positive. Individuals must expect to gain as much or more than the costs they bear from voluntary involvement in the legal system. Protection of personal property and individual rights was apparently a sufficiently attractive benefit (along with others detailed below) to induce voluntary participation among the Yurok.

Now let us consider the actual nature of the cooperation by which property rights were defined and enforced—that is, the secondary rules that characterized the legal enterprise. First,

> we may dismiss the village and tribe with a word. Though persons were identified by their village of residence and their tribe of origin, neither of these groups had any direct claim upon the action of the individual, there was no village nor national government, no village or tribal action in wars. Significantly, the affiliation could effectively be broken by moving to a distance or to one of the other tribes within the orbit of the culture.[40]

These Indian tribes nevertheless had a well-developed system of private judging.[41] For instance, if a Yurok wanted to process a legal claim he would hire two, three, or four "crossers"—nonrelatives from a community other than his own. The defendant in the claim would also hire crossers, and the entire group hired by both parties would act as go-betweens, ascertaining claims and defenses and gathering evidence. The crossers would render a judgment for damages after hearing all the evidence.

The formal dispute resolution system involved clear rules of adjudication. And as Hart himself noted, "a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative

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determinations of what the rules are."[42] A large number of offenses were recognized by these Northern California tribes, ranging from murder, adultery, theft, and poaching to curses and minor insults.[43] Since there was no formalized social unit, all offenses were against the person (torts). This is an inevitable result of the procedures developed in this society, of course, since for disputes to arise and require the attention of crossers, some action by one individual had to affect another person negatively for it to be an issue of law. Actions that were clearly not of this kind, such as what a person did alone or in voluntary collaboration with other persons but in a manner that clearly did not affect or harm others, could never become subject to rules of conduct that would concern a crosser.

Yurok law contained a clearly indicated fine or indemnity to be paid to the plaintiff by the offender if the crossers' judgment was that the defendant was guilty. Liability, intent, the value of the damages and the status of the offended person were all considered in determining the indemnity. Every invasion of person or property could be valued in terms of property, however, and each required exact compensation. Again, law clearly was in the nature of modern tort law rather than criminal law. But how was the judgment enforced? After all, "Government was strictly *laissez faire* [in fact, nonexistent given the definition proposed here], with order prevailing through the consistent effort of each person to serve his own self interest."[44]

The crossers' judgment was enforceable because there was an effective threat of total ostracism by the entire community of tribes—an extreme form of a boycott sanction that will be discussed over and over below. In this Northern California society, if someone failed to pay the fine he automatically became the plaintiff's wage slave. If he refused to submit to this punishment, he became an outcast or "outlaw," which meant that anyone could kill him without any liability for the killing. Fear of this severe boycott sanction meant that the crossers' judgment tended to be accepted, of course. The threat of violence does not, in itself, imply that violence was the norm. Indeed, this and other primitive legal systems had as their basic impetus the desire by individuals to *avoid* violence.

The next question is how the community cooperated in order to make the threat of ostracism viable. Each man in these tribes was a member of a "sweathouse group"—a group of the men from three or more neighboring houses who shared a sudatory.[45] He was free to join any group as long as others in the group agreed. The groups were more than just social organizations, however. They carried out religious rituals, and they acted in mutual support in the case of a dispute. Each member had strong incentives to provide support because at some point in the future he might find himself in a dispute and require the current disputant to reciprocate. Thus, if an offender refused the judgment of the crossers and became an outlaw, the offended individual's sweathouse group would back his effort for physical retribution. The rest of the community would not interfere.

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Yurok laws and their sanctions were clearly defined, and a system of authority was established whereby those laws could be enforced. The authority was established through reciprocal arrangements. As Pospisil explained, authority can be "coercive or permissive."[46] That is, individuals can be forced to accept authority or they can be persuaded. It was clearly in the best interests of individual members of the Yurok and related tribes to voluntarily join in reciprocal arrangements and, in doing so, to submit to the adjudication process established in that society in the event of a dispute. This voluntarism largely avoided the inefficiencies inherent in violent forms of dispute resolution.

Fuller suggested three conditions that make a legal (or moral) duty clear and acceptable to those affected:

> *First,* the relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected; they themselves "create" the duty. *Second,* the reciprocal performances of the parties must in some sense be equal in value. Though the notion of voluntary assumption itself makes a strong appeal to the sense of justice, that appeal is reinforced when the element of equivalence is added to it. We cannot here speak of an exact identity, for it makes no sense at all to exchange, say, a book or idea in return for exactly the same book or idea. The bond of reciprocity unites men, not simply in spite of their differences but because of their differences. When, therefore, we seek quality in a relation of reciprocity what we require is some measure of value that can be applied to things that are different in kind. *Third,* the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow—in other words, the relationship of duty must in theory and in practice be reversible. . . .
>
> These, then are the three conditions for an optimum realization of the notion of duty; the conditions that make a duty most understandable and most palatable to the man who owes it.[47]

Clearly these three conditions were met in the Yurok sweathouse groups. The arrangements were voluntarily entered into. An individual exchanged a commitment to support others in the case of a legal dispute for the equivalent commitment from those other individuals for the same support should he find himself in such a dispute. And finally, the arrangement was symmetrical in the sense that each individual had strong incentives to support anyone in his group in the event of a dispute because he realized that he might require the same kind of backing in the future when his own property rights might be threatened. The fact that men voluntarily entered into such reciprocal arrangements implies that the accompanying duties were clearly spelled out and generally fulfilled when a dispute arose.

The enterprise of law is a necessary prerequisite for social interaction. The development of society must be accompanied by the simultaneous evolution of a legal system. Lon Fuller proposed that "customary law" such as that practiced among Yurok might best be described as a "*language of interaction.*"[48] He pointed out that

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> to interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite members will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten code of conduct. The word *code* is appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.[49]

This function of facilitating interaction among the Indians of Northern California was accomplished, in large part, by the authority of clear—although unwritten—codes of conduct enforced through reciprocally agreed upon, well-established arbitration arrangements, with established legal sanctions backed by the threat of ostracism and, ultimately, physical retribution. In fact, it really is the "matching of expectations which is all the law can aim to facilitate."[50] This enterprise to facilitate interaction by matching expectations obviously tends to promote certainty and efficiency.

Naturally, it is difficult to judge the actual degree of the certainty and efficiency of this primitive legal system. However, there is some indirect evidence. For one thing, these California Indians were ". . . a busy and creative people . . . [and] poverty was not found here."[51] If incentives were in place to induce "busy and creative" behavior, it is likely that individuals and their private property rights were quite well protected. However, the widespread recognition of private property rights implies a more significant level of certainty than that. "It is only through thus defining the protected sphere of each that law determines those 'actions towards others' which it regulates, and that its general prohibition of actions 'harming others' is given determinable meaning. This maximal certainty of expectations which can be achieved in a society in which individuals are allowed to use their knowledge . . . is secured by rules which tell everyone which . . . circumstances must not be altered by others and which he himself must not alter."[52]

Laws and procedures for enforcement among the Yurok and their neighboring tribes have been well documented. Together they imply well-established rules of recognition and adjudication, but what about rules of change? Actual examples of changes in Yurok law are not documented. This is, unfortunately, a limitation of much of the anthropology literature, although not all, as noted below. Pospisil explained that "since many societies have been studied for a relatively brief period (one or two consecutive years), and since many investigators have been heavily influenced by the early sociological dogma that divorces the individual from the 'social process,' it follows that there are very few accounts of volitional innovations [in primitive law]."[53] However, rules of adjudication imply rules of change because adjudication of a dispute often leads to articulation of a new law, or at

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least clarification of existing unwritten law in the context of an unanticipated circumstance. As Fuller explained:

> Even in the absence of any formalized doctrine of stare decisis or res judicata, an adjudicative determination will normally enter in some degree into litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal. Even if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly.[54]

Crossers, in the process of settling disputes, were on occasion likely to make new rules, just as today's judges set precedents that become part of the law.

There is, in fact, a more fundamental reason to expect that the laws of the Yurok could and did change. After all, those laws were not imposed on this society by a sovereign. They *developed* or *evolved* internally. Clearly the Indians of Northern California were a very homogeneous group by the time their laws and legal procedures had advanced to the level described above, but this homogeneity had to develop in conjunction with an evolving process of interaction and reciprocity facilitated by customary law. The Yurok had a well-established legal system defining and protecting private property rights. Carl Menger proposed that the origin, formation, and the ultimate process of all social institutions—including law—is essentially the same as the spontaneous order Adam Smith described for markets.[55] Social institutions coordinate interactions. Markets do this and so does law, as Fuller stressed. Institutions develop the way they do because, perhaps through a process of trial and error, it is found that the actions they are intended to coordinate are performed more effectively under one system or process than under another. The more effective institutional arrangement replaces the less effective.

In the case of customary law, traditions and habits evolve to produce the observed "spontaneous order," to use Hayek's term. As Hayek explained, however, while Smith's and Menger's insights regarding the evolution of social order "appear . . . to have firmly established themselves [in several of the social sciences] another branch of knowledge of much greater . . . influence, jurisprudence, is still almost wholly unaffected by it."[56] In particular, the legal positivist view holds that law is the product of deliberate design rather than the evolutionary, undesigned outcome of a process of growth. In fact, however, as this discussion of primitive law demonstrates, the *secondary rules* that Hart proposed must be "imposed" in order to create a legal system "*evolved*" *without the design of any absolute authority.*

In the case of the Yurok, the earliest sweathouse groups probably proved to be an effective social arrangement for internalizing reciprocal legal and religious benefits, *relative* to previously existing arrangements. Others saw those benefits and either joined existing groups or copied their successful characteristics and formed new groups. In the process, the arrangements may have been improved upon and become more formal (contractual) and effective. It is perfectly con-

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ceivable that neither members of the earliest groups nor those that followed even understood what particular aspect of the contract actually facilitated the interactions that led to an improved social order—they may have viewed the religious function of the group to be its main purpose and paid little attention to the consequences of their legal functions, for instance. Customary law and society develop coterminously. Those customs and legal institutions that survive are relatively efficient because the evolutionary process is one of "natural selection," where laws or procedures that serve social interaction relatively poorly are ultimately replaced by improved laws and procedures.

The discussion of the Yurok legal system has served two purposes. First, it provided strong indications that the evolutionary enterprise of law produces secondary rules of recognition, adjudication, and change despite the fact that no government or absolute authority figure existed to mandate such rules. Second, it introduced several general characteristics of virtually all primitive legal systems. They are: (1) primary rules characterized by a predominant concern for individual rights and private property; (2) placement of the responsibility for law enforcement in the hands of the victim with recognition of his rights arising through reciprocal arrangements for protection and support when a dispute arises; (3) standard adjudicative procedures established in order to avoid violent forms of dispute resolution; (4) offenses treated as torts punishable by economic payments in restitution; (5) strong incentives to yield to prescribed punishment (recognize the law's authority) when guilty of an offense because of the threat of social ostracism leading to physical retribution; and (6) legal change arising through an evolutionary process of developing customs and norms.

Let us now turn to some of the other primitive systems that anthropologists have studied. We shall find that the specific legal procedures may be different from those of the Yurok and their neighbors, but that each society has established Hart's secondary rules to one degree or another and that the same six characteristics listed here apply.

IV. The Legal System of the Ifugao of Northern Luzon

Privately produced law in primitive societies is not unique to the American Indian.[57] For example, "the great significance of the Ifugao for the study of the nature and function of primitive legal and political institutions rests in the fact that they reveal how far it is possible to elaborate a system of interfamilial law on the foundation of quite elementary social structure. They reveal how wrong are political theorists who hold that law and government are wholly indivisible."[58] The economy of the Ifugao in Northern Luzon during the early 1900s was dominated by an intensive irrigation hoe culture. Such an economy inevitably requires laws, if for no other reason than to resolve issues over water rights and maintain a complex real-estate system. And the Ifugao developed a very elaborate

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system of substantive law. Yet the Ifugao had no tribal, district, or village governmental organizations, and no centralized authority with the power to force compliance with the laws or to levy compulsive sanctions on behalf of the society at large. The family had a leader, but not in the sense of a political organization: "Although he leads the family in legal and economic enterprise, its members think of him more as an integrating core than as a head who in any way dominates."[59]

The family, which for any individual included ascendants and descendants of both his father and his mother to the third degree, was the individual's source of support in legal matters. "The mutual duty of kinfolk and relatives, each individual to every other of the same family, regardless of sex, is to aid, advise, assist, and support in all controversies and altercations with members of other groups or families."[60] The family members were obligated to aid another member in direct proportion to the closeness of their kinship or relationship through marriage and to the extent to which that member had fulfilled his obligations to the family in the past. The ability to obtain support in a dispute thus depended on reciprocal loyalty, much as with the Yurok, but in this case the support group was clearly defined by kinship.

Individual disputes were not settled by warfare between families, however. As with the Yurok, well-established adjudication procedures were designed to resolve disputes without violent confrontations. The factor behind dispute resolution—the impetus for reaching an agreement—was the ever present threat of force, but use of force was certainly not the norm. The key figure in any difficult dispute among the Ifugao was the *monkalun.* He was a go-between or mediator.[61] The *monkalun* had no vested authority to impose a solution on disputants, however. He was like the private mediators of today, receiving a fee if he could somehow lead the two parties to a peaceful settlement. The *monkalun* was not likely to be a close relative to either of the parties in dispute since his only real power was that of persuasion, and a close relative of one party would have considerable difficulty in persuading the other. His "authority" in disputes was voluntarily granted by those involved because they were convinced that he would perform his function well—that is, achieve a nonviolent resolution of the dispute.

Ostracism provided important incentives for law enforcement, as with the Yurok. Among the Ifugao, however, an individual was expected to collect all debts owed him or punish injuries to him that were not compensated for: "Did he not do so he would become the prey of his fellows. No one would respect him . . . [he would] hear himself accused of cowardice and called a woman."[62] Ifugao law, like all privately produced law, was in the nature of torts—private wrongs or injuries—since "criminal law" implies some wrong against society. Thus it was up to the aggrieved party to pursue prosecution. However, Ifugao legal procedure required the use of a *monkalun.* After all, if the accuser took matters into his own hands and killed the accused, the family of the accused was

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obliged to avenge the death by killing the initial accuser. The two families (as well as nonfamily residents of the village or villages involved) were eager for a peaceful settlement, then, in order to avoid an extended violent confrontation.

In fact, a great number of cultural taboos (customary laws of adjudication) kept the two parties in a dispute apart as long as the *monkalun* was working toward a settlement. The *monkalun* truly was a go-between in the sense that he heard all testimony and confronted each party with the other party's evidence. As long as a peaceful settlement was remotely possible, this mediator strove for that solution. His fee (paid by the defendant) depended on it, and more importantly ". . . the peaceful settlement of cases in which he is mediator builds up a reputation for him, so that he is frequently called and so can earn many fees."[63] Mediation was a competitive industry.

The damages paid by an Ifugao defendant as restitution were fairly clearly spelled out, as they were with the Yurok Indians and their neighbors. When both parties in the dispute were of the same social class or status, the compensation was easily determined.[64] Although settlements in disputes between people of different social status were a bit more complex, there still were fairly clear standards for judgments. The violation of contracts or commission of torts was virtually always sanctioned by property assessments.

But what happened if the defendant refused to admit his guilt and would not come to terms through the *monkalun*? Did interfamily warfare break out? The answer to the second question is no because the answer to the first is that such a refusal would be viewed as an insult to the *monkalun* and align his family against whichever party initiated the violence. This prospect deterred any immediate action by either party even when an impasse was reached. If a *monkalun* saw no prospect for a settlement, he would formally withdraw and declare a truce, which had to last for between two weeks and a month. If the truce was violated, the *monkalun* and his family would align themselves against the aggressor.

At the end of the truce the plaintiff had two options. He could find a new *monkalun* and hope for a peaceful settlement, or he and his family could begin preparing to ambush the defendant. Typically, if the plaintiff's claim was just, a successful ambush would not result in retaliation by the slain defendant's family. It was generally only when the claim was not justified that retaliation occurred and ". . . it was here that Ifugao law breaks down" as feuds resulted.[65] However, the entire justice system was designed to avoid this end, and indeed,

> Within the "home district" (i.e., a given valley system) resort to killing is rare, however. Neighbors not involved in the dispute exert pressure on the litigants to come to terms. The *monkalun* extends his efforts to the utmost. And the litigants also feel an obligation not to endanger home security. When [a feud] does occur . . . [it] will be brought to a close before too long.[66]

One might argue that the *potential* for this breakdown in the private system of law and order developed by the Ifugao implies that the system was incomplete

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or ineffective, even though such breakdowns were rare. Of course, every legal system can break down in the same way because individuals can always take the law into their own hands and face the consequences. In fact, the Ifugao system appears to have been quite effective. Given the almost continual warfare that existed *between* various districts, the private system of law and order seems to have kept violence *within* each district to a very low level.[67] Once again we find a clear legal enterprise that produced a recognition of the authority of widely known although unwritten law protecting property rights and an apparently efficient dispute resolution mechanism.

V. Evolutionary Law: The Kapauku Papuans of West New Guinea

Many legal scholars have contended that primitive legal systems were quite static and resistant to change.[68] This opinion is frequently traced to Sir Henry Maine.[69] Maine wrote that "the rigidity of primitive law . . . has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form."[70] E. A. Hoebel, however, has remarked that "If ever Sir Henry Maine fixed an erroneous notion on modern legal historians, it was the idea that primitive law, once formulated, is stiff and ritualistic."[71] Similarly, Pospisil explained that several examples of change in primitive law have been documented.[72]

The examples of primitive legal systems discussed earlier indicate that many of these systems have a great deal in common. Indeed, additional detailed examples would begin to sound both repetitive and redundant. However, the preceding examples lack strong documentation of Hart's rules of change, which he considered to be necessary for existence of a true legal system, and for this reason one more primitive system will be discussed. Pospisil's work with and discoveries about the legal system of the Kapauku Papuans of West New Guinea is chosen because of his explicit discussion of the process of legal change in this society. Before examining this particular aspect of Kapauku law, however, the society and its legal system will be briefly discussed.

The Kapauku Papuans were a primitive linguistic group of about 45,000 living by means of horticulture in the western part of the central highlands of West New Guinea until well past the middle of this century. Their reciprocal arrangements for support and protection were based on kinship, as with the Ifugao. However, members of two or more patrilineages typically joined together for defensive and legal purposes, even though they often belonged to different sibs. These "confederations" often encompassed from three to nine villages, with each village consisting of about fifteen households.

The Kapauku had no formal government with coercive power. Most observers have concluded that there was a virtual lack of leadership among these people.

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One Dutch administrator noted, however, that "there is a man who seems to have some influence upon the others. He is referred to by the name *tonowi* which means 'the rich one.' Nevertheless, I would hesitate to call him a chief or a leader at all; *primus inter pares* [the first among equals] would be a more proper designation for him."[73] In order to understand the role and prestige of the *tonowi,* one must recognize two basic values of the Kapauku: an emphasis on individualism and on physical freedom.[74] The emphasis on individualism manifested itself in several ways. For instance, a detailed system of private property rights was evident. In fact, there was absolutely no common ownership. "A house, boat, bow and arrows, field, crops, patches of second-growth forest, or even a meal shared by a family or household is always owned by one person. Individual ownership . . . is so extensive in the Kamu Valley that we find the virgin forests divided into tracts which belong to single individuals. Relatives, husbands and wives do not own anything in common. Even an eleven-year-old boy can own his field and his money and play the role of debtor and creditor as well."[75]

The paramounts role of individual rights also was evident in the position of the *tonowi* as a person who had earned the admiration and respect of others in the society. He was typically "a healthy man in the prime of life" who had accumulated a good deal of wealth.[76] The wealth accumulated by an individual in Kapauku society almost always depended on that individual's work effort and skill, so anyone who had acquired sufficient property to reach the status of *tonowi* was generally a mature, skilled individual with considerable physical ability and intellectual experience. However, not all *tonowi* achieved respect that would induce others to rely upon them for leadership. "The way in which capital is acquired and how it is used make a great difference; the natives favor rich candidates who are generous and honest. These two attributes are greatly valued by the culture."[77] Generosity was a major criteria for acceptance of a particular *tonowi* in a leadership role because, in large part, followers were obtained through contract.

Each individual in the society could *choose* to align himself with any available *tonowi* and then *contract* with that chosen *tonowi.* Typically, followers would become debtors to a *maagodo tonowi* (a "really rich man") who was considered to be generous and honest. In exchange for the loan, the individual agreed to perform certain duties in support of the *tonowi.* The followers got much more than a loan, however:

> It is good for a Kapauku to have a close relative as headman because he can then depend upon his help in economic, political, and legal matters. The expectation of future favors and advantages is probably the most potent motivation for most of the headman's followers. Strangers who know about the generosity of a headman try to please him, and people from his own political unit attend to his desires. Even individuals from neighboring confederations may yield to the wishes of a *tonowi* in case his help may be needed.[78]

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Tonowi authority was given, not taken. This leadership reflected, to a great extent, an ability to "*persuade* the unit to support a man in a dispute or to fight for his cause."[79] Thus the *tonowi* position of authority was not, in any way, a position of absolute sovereignty. It was achieved through reciprocal exchange of support between a *tonowi* and his followers, support that could be freely withdrawn by either party (e.g., upon payment of debt or demand for repayment).[80]

What happened if a *tonowi* proved to be ineffective or dishonest in his legal role? First of all, honesty and generosity were prerequisites for a *tonowi* to gather a following. However, if someone managed to do so and then proved to be a bad leader, he simply lost his following. "Passive resistance and refusal of the followers to support him is . . . the result of a decision [considered unjust]."[81] Clearly, change in the legal authority was possible; indeed, one purpose of the Kapauku procedure that involved articulation of relevant laws by the *tonowi* was to achieve public acceptance of his ruling. As Fuller noted, one course of "the affinity between legality and justice consisted simply in the fact that a rule articulated and made known permits the public to judge its fairness."[82]

The informality and contractual characteristics of Kapauku leadership led many western observers to conclude that Kapauku society lacked law, but clear evidence of rules of recognition, adjudication, *and* change can be demonstrated within the Kapauku's legal system.

Rules of Recognition

A "mental codification of abstract rules" existed for the Kapauku Papuans, so that legal decisions were part of a "going order."[83] Recognition of law was based on kinship and contractual reciprocities motivated by individual rights and private property. Grammatical phrases and references to specific customs, precedents, or rules were present in all adjudication decisions Pospisil observed during his several years of studying the Kapauku. He concluded that "not only does a legal decision solve a specific case, but it also formulates an ideal—a solution *intended* to be utilized in a similar situation in the future. The ideal component binds all other members of the group who did not participate in the case under consideration. The authority himself turns to his previous decisions for consistency."[84] The authority of the law is obvious, as is the drive for certainty. Legal decisions had the status of modern legal precedents, and therefore it should be obvious that rules of adjudication *and* change existed since the setting of and reference to precedent is a form of "legislation."

Rules of Adjudication

The Kapauku process of law appears to have been highly standardized, almost to the point of ritual. It typically started with a loud quarrel, during which the plaintiff accused the defendant of committing some harmful act while the defen-

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dant responded with denials or justification. The quarrel involved loud shouting for the purpose of attracting other people, including one or more *tonowi.* The close relatives and friends of those involved in the dispute would take sides, presenting opinions and testimony in loud, emotional speeches. The *tonowi* generally simply listened until the exchange of opinion approached the point of violence, whereupon he stepped in and began his argument. If he waited too long, an outbreak of "stick fighting" or even war could occur, but this was rare. (Pospisil observed 176 dispute resolutions involving "difficult cases"; only 5 led to stick fights and 1 resulted in war.[85]) The *tonowi* began his presentation by "admonishing" the disputants to have patience and then proceeded to question various witnesses. He would search the scene of the offense and the defendant's house or both for evidence if doing so was appropriate. "Having secured the evidence and made up his mind about the factual background of the dispute, the authority starts the activity called by natives *boko duwai,* the process of making a decision and inducing the parties to the dispute to follow it."[86] The *tonowi* would make a long speech, summing up the evidence, appealing to the relevant rules and precedents, and *suggesting* what should be done to end the dispute.

When judged to be guilty a Kapauku was punished. The specific sanction for a case was suggested by the *tonowi* if the dispute required his intervention, and if the dispute was settled it meant the guilty offender *agreed to accept* that sanction. Sanctions in this society varied considerably, depending on the offense. They included economic restitution and various forms of physical punishment. Despite the use of a wide array of sanctions, however, the Kapaukus' paramount concern for individual freedom precluded certain types of punishments widely used in western societies. There was no such thing as imprisonment, for instance, and neither torture nor physical maiming was permitted. (Both have been common in western societies, of course.[87]) Moreover, capital punishment was not the normal sanction even for violent crimes. As with the Yurok and Ifugao, however, "economic sanctions are by far the most preferred ones among the Kapauku."[88]

The Kapauku did resort to physical punishment at times, nonetheless. In fact, defendants often had a choice between an economic sanction or a physical sanction, frequently choosing the latter. Sometimes an offense was considered too severe to warrant economic payment. "A heinous criminal or a captured enemy would be killed but never tortured or deprived of liberty."[89] In keeping with the emphasis on individual freedom, however, the killing generally took place through an ambush with bow and arrow:[90] "A culprit . . . would always have the chance to run or fight back."[91]

A third type of sanction was also applied by the Kapauku—psychological sanctions. "The most dreaded and feared of the psychological and social sanctions of the Kapauku is the *public reprimand.* . . . The Kapauku regard this psychological punishment as the most effective of their entire inventory of sanctions."[92] Furthermore, punishment by sorcery or through the shaman's helping spirits was

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also employed when the offender was strong enough to resist a *tonowi's* decisions. "Disease and death are the ultimate (psychosomatic) effect of this 'supernatural' punishment."[93]

This suggests one solution to the problem that might arise when a defendant refused to submit to the sanction proposed by a *tonowi,* an infrequent but possible outcome of the Kapauku legal process. As Fuller explained, one form of punishment in primitive societies has often been "an exercise of magical powers on the offender to purge the community of an uncleanliness. A similar purging was accomplished through the generous use of ostracism."[94] In fact then, the use of magic was simply one form of ostracism, and another, the one mentioned in earlier discussion, was also a solution when a judgment was not accepted. Ostracism by all members of a confederation was the ultimate threat.[95]

Rules of Change

Pospisil documented two ways that legislation could occur. First, very simply, law could change as custom changed. One example of such an occurrence had to do with the Kapauku adultery laws. It was customary until a few years prior to 1954 that an adulterous woman would be executed by her husband. However, men, and particularly relatively poor men, came to realize that such a sanction was too costly because of the high price paid for a wife. As a result, the punishment was changed to beating or perhaps wounding the adultress. The change was made initially by relatively poor men and was resisted by rich Kapauku Papuans. However, the new customary sanction was upheld by *tonowi* in four adultery cases observed by Pospisil during the 1954–55 period: "Thus what started as a more economical practice among the poorer husband became customary law by being incorporated into legal decisions."[96] In a similar fashion, of course, a law that at one time is applied can loose its popular support and effectively be abolished.[97]

A second procedure for legal change was also observed among the Kapauku. A change in one lineage's law of incest resulted from "successful legislation" by a sublineage *tonowi:* "He succeeded in changing an old rule of sib exogamy into a new law that permitted intrasib marriages as close as between second cousins."[98] This legislation was not authoritarian in the sense that its passage forced compliance by others, of course. Rather its acceptance spread through voluntary recognition. First it was adopted by the *tonowi,* then by more and more young men in his sublineage, and ultimately by *tonowi* of other sublineages within the same lineage. The head of the confederacy, a member of that lineage, also ultimately accepted the new law, but other lineages in the same confederacy did not, and thus incest laws varied across lineages within the same confederacy.[99] The characteristic that distinguishes this legal change from the previous one is that it was an intentional legal innovation *initiated* by a *tonowi.* Its adoption was still voluntary, however. Popisil concluded that in primitive systems "legal phenomena are constantly changing as does the rest of the culture."[100]

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VI. Law in Primitive Societies: Conclusions and Implications

Many economists and legal scholars believe that physical sanctions administered by a politically organized society are the basic criteria of law, and thus many primitive societies have been held to be "lawless." The examples of law among the Yurok, Ifugao, and Kapauku clearly contradict this view, and they are, in fact, only examples. Many other primitive societies could be similarly characterized. As Hoebel explained, in virtually all primitive societies

> the community group, although it may be ethnologically a segment of a tribe is autonomous and politically independent. There is no tribal state. Leadership resides in family or local group headmen who have little coercive authority and are hence lacking in both the means to exploit and the means to judge. They are not explicitly elected to office; rather, they lead by the tacit consent of their followers, and they lose their leadership when their people begin no longer to accept their suggestions. . . . As it is, their leadership is confined to action in routine matters. The patriarchal tyrant of the primitive horde is nothing but a figment of nineteenth-century speculation. The simplest primitive societies are democratic to the point of near-anarchy. But primitive anarchy does not mean disorder. Anarchy as synonymous with disorder occurs only temporarily in complex societies when in a social cataclysm the regulating restraints of government and law are suddenly and disastrously removed.[101]

Customary systems of law maintained internal order in primitive societies even when violence and warfare characterized relationships with other groups or societies. This customary law often was quite complex, systematically covering all types of torts and breaches of contract relevant to the society. (There were no "criminal laws" since all offenses were against individuals rather than the "society" as represented by a government.) The rules and institutions established to carry out the law appeared to be effectively designed to alleviate uncertainty, enhance efficient interactions between members of the societies, and encourage legal change as a reflection of changing needs. In particular, these primitive arrangements clearly were intended to minimize the chance of violent confrontations within the societies while maintaining systems of private property and individual rights.

One might argue that the privately provided law of primitive society has no relevance today, since the simply arrangements described above could never be effective in a more complex society. Even if this argument is true, however, there are some very significant reasons to study primitive systems of privately produced law and order. For example, as Lon Fuller explained, "if we look closely among the varying social contexts presented by our own society we shall find analogues of almost every phenomenon thought to characterize primitive law."[102] An understanding of these relatively simple systems may lead us to a clearer understanding of our own.

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Furthermore, a study of the incentives and institutions of primitive law and the resulting primary and secondary rules makes it evident that precisely the same kinds of governmentless legal systems have existed in considerably more advanced, complex societies, ranging from Medieval Iceland,[103] Ireland,[104] and Anglo-Saxon England,[105] to the development of the Medieval Law Merchant and its evolution into modern international commercial law,[106] and even to the western frontier of the United States during the 1800s.[107] The fact is that much of the law that guides today's complex American society actually evolved from or is simply a reflection of precisely the same customary law sources as those underlying the legal systems discussed above. In particular, private property rights appear to be a product of customary, not government produced, law. Market prices and institutions arise spontaneously in order to facilitate interaction. Economists should not be surprised to find that private property and legal institutions can exist without government, since their purpose is similarly to facilitate interaction.

NOTES

1. Robert Redfield, "Primitive Law," in Paul Bohanan, ed., *Law and Warfare* (Garden City, N.Y.: The Natural History Press, 1967).
2. Wolfgang G. Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens, 1951), p. 281. Emphasis added.
3. Bernard P. Herber, *Modern Public Finance: The Study of Public Sector Economics* (Homewood, Ill.: Richard D. Irwin, 1975).
4. F. A. Hayek, *Law, Legislation and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973), p. 73.
5. For example, John Baden, Richard Stroup, and Walter Thurman, "Myths, Admonitions and Rationality: The American Indian as a Resource Manager," *Economic Inquiry* 19 (January 1981): 399–427; and D. Bruce Johnsen, "The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians," *Journal of Legal Studies* 17 (January 1986): 41–67.
6. Actually, the production of law and allocation of its enforcement can easily be characterized as a market process. See Bruce L. Benson, *Liberty and Justice: Alternatives in the Provision of Law and Order* (San Francisco, Calif.: Pacific Institute) Forthcoming.; and Bruce L. Benson and Eric Engen, "The Market for Laws: An Economic Analysis of Legislation," *Southern Economic Journal* 54 (January 1988): 732–745.
7. Baden, Stroup and Thurman, "Myths, Admonitions and Rationality."
8. Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57 (May 1967): 347–359.
9. Johnsen, "The Formation and Protection of Property Rights."
10. David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (March 1979): 399–415.
11. Richard A. Posner, "A Theory of Primitive Society, with Special Reference to Primitive Law," *Journal of Law and Economics* 23 (April 1980): 1–53; and Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981).
12. Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul, 1926).
13. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 130.
14. Ibid., p. 151.
15. Redfield, "Primitive Law," p. 3.
16. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 89–96.

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17. Ibid., p. 89.
18. Ibid., p. 90.
19. Ibid.
20. Ibid.
21. Ibid., p. 91.
22. Ibid.
23. Ibid., p. 92.
24. Ibid., p. 94.
25. Kenneth I. Winston, "Editors Note," in Lon L. Fuller, ed., *The Principles of Social Order* (Durham, N.C.: Duke University Press, 1981).
26. In fact, Hart's distinction between primary and secondary rules is closely associated with, if not synonomous with, the distinction between "private law" and "public law" made by many legal scholars. Private law is often used to designate rules of conduct while public law refers to the rules setting up the apparatus of government to enforce those rules of conduct. See Hayek, *Law, Legislation and Liberty*, pp. 133, 176–178. This distinction is not made here because the term "public law" implies existence of a state and its government, but as noted above, secondary rules can and do evolve without a state.
27. Fuller, *Morality of Law*, pp. 133–155.
28. Hayek, *Law*, vol. 1, pp. 96–97.
29. Fuller, *Morality of Law*, p. 138.
30. Hart implied that law typically must be written to be recognized, but, according to Fuller, "to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that [it] . . . be publicized and clearly stated diminishes in importance." Ibid., p. 92.
31. Hart, *Concept of Law*, p. 89.
32. John Umbeck, *A Theory of Property Rights With Applications to the California Gold Rush* (Ames, Iowa: Iowa State University Press, 1981); and John Umbeck, "Might Makes Rights: A Theory of the Foundation and Initial Distribution of Property Rights," *Economic Inquiry* 19 (January 1981): 38–59.
33. Friedman, "Private Creation and Enforcement of Law."
34. Joseph R. Peden, "Property Rights in Celtic Irish Laws," *Journal of Libertarian Studies* 1 (1977).
35. In effect, government is held to exist when the system of authority has characteristics common to those nations ruled by kings in Europe during the medieval period (and several earlier periods, of course), or characteristics that have since evolved as kings centralized and expanded their powers and groups of citizens reacted in an attempt to limit the kings' efforts. See Benson, *Liberty and Justice*, for details.
36. Ibid.
37. Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (January 1989): 644–661.
38. Walter Goldsmidt, "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge," *American Anthropologist* 53 (October-December 1951): 506–524.
39. Hayek (*Law*, vol. 1, p. 108) explained that it is an

> erroneous idea that property had at some late stage been 'invented' and that before that there had existed an early state of primitive communism. This myth has been completely refuted by anthropological research. There can be no question now that the recognition of property preceded the rise of even the most primitive cultures, and that certainly all that we call civilization has grown up on the basis of that spontaneous order of actions which is made possible by the delimitation of protected domains of individuals and groups. Although the socialist thinking of our time has succeeded in bringing this insight under suspicion of being ideologically inspired, it is as well demonstrated a scientific truth as any we have attained in this field.

40. Goldsmidt, "Ethics," p. 506.
41. William M. Landes and Richard A. Posner, "Adjudication as a Private Good," *Journal of Legal Studies* 8 (March 1979), p. 243.

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42. Hart, *Concept of Law*, p. 89.
43. Goldsmidt, "Ethics," p. 512.
44. Redfield, "Primitive Law," p. 8.
45. Goldsmidt, "Ethics," p. 512.
46. Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971), p. 58.
47. Fuller, *Morality of Law*, pp. 23–24.
48. Fuller, *Principles of Social Order*, p. 213.
49. Ibid.
50. Hayek, *Law, Legislation and Liberty*, p. 111.
51. Goldsmidt, "Ethics," pp. 513–514.
52. Hayek, *Law*, vol. 1, pp. 108–109.
53. Pospisil, *Anthropology of Law*, p. 215.
54. Fuller, *Morality of Law*, p. 90. The arguments which follow are expanded upon in Bruce L. Benson, "Legal Evolution in Primitive Societies," *Journal of Institutional and Theoretical Economics* 144 (December 1988): 772–788.
55. Carl Menger, *Problems of Economics and Sociology*, trans. Francis J. Nook, Louis Schneider, ed., (Urbana, Ill.: 1963); and Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1937).
56. F. A. Hayek, *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), p. 101.
57. The laissez-faire society of Northern California is not the only instance of private law and order among the American Indians. In fact, Hoebel explained that law existed for many Indian societies without a political state. (E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge, Mass.: Harvard University press, 1954), p. 188.)
58. Ibid., p. 100. Parts of the presentation in this section can be found in Bruce L. Benson, "The Lost Victim and Other Failures of the Public Law Experiment," *Harvard Journal of Law and Public Policy* 9 (Spring 1986): 399–427.
59. Hoebel, *Law of Primitive Man*, p. 101.
60. R. F. Barton, "Procedure Among the Ifugao," in Paul Bohanan, ed., *Law and Warfare* (Garden City, N.Y.: The Natural History Press, 1967), p. 161.
61. Ibid., p. 163.
62. Ibid., pp. 164–165.
63. Ibid., p. 166.
64. Hoebel, *Law of Primitive Man*, p. 117.
65. Ibid., p. 121.
66. Ibid.
67. Hoebel explained that as an Ifugao moved away from his home district he moved through a "neutral zone" into a "feudal zone" where, "Permanent feuding relations with certain families in the area are the thing" (Ibid., p. 122). There were also "war zones" where, "Anybody in the area is killed on sight" (Ibid., p. 124). It should be noted that such interdistrict warfare was not "warfare" as conceived in modern society, where one political organization seeks to take territory and/or resources from another; rather it was a social and religious institution with successful headhunting generating social prestige and religious "benefits."
68. For example, see Posner, *Economics of Justice*, p. 178.
69. Sir Henry S. Maine, *Ancient Law*, 3rd American from 5th English edition (New York: Henry Holt and Co., 1864).
70. Ibid., p. 74.
71. Hoebel, *Law of Primitive Man*, p. 283.
72. Pospisil, *Anthropology of Law*, pp. 194, 206, 208.
73. Quoted in Ibid., p. 64.
74. Ibid., p. 65.
75. Ibid., p. 66.
76. Ibid., p. 67.
77. Ibid. Other criteria were important as well, including an ability and willingness to speak in public.
78. Ibid., pp. 68–69.

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79. Ibid., pp. 69–70.
80. One group of a *tonowi's* followers was especially faithful and dependable, always available when a need for support arose. They were called *ani jokaani* or "my boys," and consisted of a group of young men who were "adopted" by the *tonowi* and became his "students" (Ibid., p. 69):

> They came to live with the rich man to learn especially how he transacted business, to secure his protection, to share his food, and, finally, to be granted a substantial loan for buying a wife. In return they offer their labor in the fields and around the house, their support in legal and other disputes, and their lives in case of a war. The boys may be from different sibs and confederacies, or they may be relatives.
>
> . . . However, this contractual association is quite loose. Both parties are free to terminate it at any time and the boy is never treated as an inferior by the rich man.

81. Ibid., p. 94.
82. Fuller, *Morality of Law*, p. 159.
83. Pospisil, *Anthropology of Law*, p. 80.
84. Ibid., p. 80.
85. Ibid., p. 36.
86. Ibid.
87. See Benson, *Liberty and Justice*.
88. Pospisil, *Anthropology of Law*, p. 93.
89. Ibid., p. 65.
90. Interestingly, in many of these cases "the punishment was carried out by a close patrilineal relative of the culprit. . . . Employment of patrilineal relatives to participate in the killing was a clever cultural device to prevent internal strain and feuds" (Ibid., p. 92).
91. Ibid., p. 65. Another form of physical sanction was beating the head and shoulders of the offender with a stick. Again the individual was not constrained and could fight back, but in each instance observed by Pospisil submitted without raising a defense. Individual defendants apparently *chose* to submit to the beating rather than make a payment to the victim or his heirs.
92. Ibid., p. 93. Other psychological sanctions were also employed. A private warning given by a *tonowi* for a minor violation of a taboo or for lying could cause the guilty party to suffer "a loss of face once it becomes known that he was punished in such a way."
93. Ibid., p. 94.
94. Fuller, *Morality of Law*, pp. 143–144.
95. Rules of adjudication among the Kapauku were much more detailed than suggested in this brief discussion. For instance, there were clearly specified, detailed jurisdictional delineations. See Pospisil, *Anthropology of Law*, or Benson, *Liberty and Justice*.
96. Pospisil, *Anthropology of Law*, p. 205.
97. Fuller explained the procedure of such changes in customary law, as follows, noting that change like this is quite common and can occur quite quickly (*Principles of Social Order*, pp. 227–229):

> Where by his actions toward B, A has (whatever his actual intentions may have been) given B reasonably to understand that he (A) will in the future in similar situations act in a similar manner, and B has, in some substantial way, prudently adjusted his affairs to the expectation that A will act in accordance with this expectation, then A is bound to follow the pattern set by his past actions toward B. This creates an obligation by A to B. If the pattern of interaction followed by A and B then spreads through the relevant community, a rule of general customary law has been created. This rule will normally become part of a larger system, which will involve a complex network of reciprocal expectations. Absorption of the new rule into the larger system will, of course, be facilitated by the fact that the interactions that gave rise to it took place within limits set by the system and derived a part of their meaning for the parties from the wider interactional context within which it occurred.

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> Where customary law does in fact spread we must not be mislead as to the process by which this extension takes place. It has sometimes been thought of as if it involved a kind of inarticulate expression of group will; the members of group B perceive that the rules governing group A would furnish an apt law for them; they therefore take over those rules by an act of tacit collective adoption. This kind of explanation abstracts from the interactional process underlying customary law and ignores their ever-present communicative aspect. . . . Generally we may say that where A and B have become familiar with a practice obtaining between C and D, A is likely to adopt this pattern in his actions toward B, not simply or necessarily because it has any special aptness for their situation, but because he knows B will understand the meaning of his behavior and will know how to react to it.
>
> There remains for discussion one further . . . notion that . . . custom becomes law only through usage observed to have persisted over a considerable period.
>
> This is, again, too simply a view of the matter . . . in part because of mistaken implications read into the word *customary,* and in part because it is true that normally it takes some times for reciprocal interactional expectations to "jell." But there are circumstances in which customary law (or a phenomenon for which we have no other name) can develop almost over night.

98. Pospisil, *Anthropology of Law,* p. 110.
99. This was possibly due to the detailed jurisdictional rules that applied in Kapauku law (see note 95).
100. Pospisil, *Anthropology of Law,* p. 348. See Benson, "Legal Evolution in Primitive Societies" for further elaboration.
101. Hoebel, *Law of Primitive Man,* p. 294.
102. Fuller, *The Principles of Social Order,* p. 243.
103. Friedman, "Private Creation and Enforcement of Law."
104. Peden, "Property Rights in Celtic Irish Law"; and Murray N. Rothbard, *For a New Liberty* (New York: Macmillan Co., 1973).
105. Benson, *Liberty and Justice* and references cited therein.
106. Ibid.; Benson, "The Spontaneous Evolution of Commercial Law"; Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Colo.: Fred B. Rothman and Co., 1983); and references cited therein.
107. Terry Anderson and P. J. Hill, "An American Experiment Anarcho-Capitalism: The *Not* So Wild, Wild West," *Journal of Libertarian Studies* 3 (1979): 9–29; Umbeck, *Theory of Property Rights;* Benson, "Lost Victim"; and Benson, *Liberty and Justice.*

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Fallacies of the Public Goods Theory and the Production of Security

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In 1849, at a time when classical liberalism was still the dominant ideological force and "economist" and "socialist" were generally—and rightly so—considered antonyms, Gustave de Molinari, a renowned Belgian economist, wrote, "If there is one well-established truth in political economy, it is this: That in all cases, for all commodities that serve to provide for the tangible or intangible need of the consumer, it is in the consumer's best interest that labor and trade remain free, because the freedom of labor and trade have as their necessary and permanent result the maximum reduction of price. And this: That the interests of the consumer of any commodity whatsoever should always prevail over the interests of the producer. Now, in pursuing these principles, one arrives at this rigorous conclusion: That the production of security should in the interest of consumers of this intangible commodity, remain subject to the law of free competition. Whence it follows: That no government should have the right to prevent another government from going into competition with it, or require consumers of security to come exclusively to it for this commodity."[1] And he comments on this whole argument by saying, "Either this is logical and true, or else the principles on which economic science is based are invalid."[2]

There is apparently only one way out of this unpleasant (for all socialists, that is) conclusion: to argue that there are particular goods to which for some special reasons the above economic reasoning does not apply. It is this that the so-called public goods theorists are determined to prove.[3] However, I will demonstrate that in fact no such special goods or special reasons exist, and that the production of security in particular does not pose a problem any different from that of the production of any other good or service, be it houses, cheese, or insurance. In spite of its many followers, the whole public goods theory is faulty, flashy reasoning, ridden with internal inconsistencies, nonsequiturs, appealing to and playing on popular prejudices and assumed beliefs, but with no scientific merit whatsoever.[4]

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What, then, does the escape route that socialist economists have found in order to avoid drawing Molinari's conclusion look like? Since Molinari's time it has become more common to answer yes to the question of whether there are goods to which different sorts of economic analyses apply. As a matter of fact, it is almost impossible to find a single contemporary economics textbook that does not make and stress the vital importance of the distinction between private goods, for which the truth of the economic superiority of a capitalist order of production is generally admitted, and public goods, for which it is generally denied.[5] Certain goods or services—among them, security—are said to have the special characteristic that their enjoyment cannot be restricted to those who have actually financed their production. Rather, people who do not participate in their financing can also draw benefits from them. Such goods are called public goods or services (as opposed to private goods or services, which exclusively benefit those people who actually paid for them). And it is because of this special feature of public goods, it is then argued, that markets cannot produce them, or at least not in sufficient quantity or quality, and hence compensatory state action is required.[6]

The examples given by different authors of alleged public goods vary widely. Authors often classify the same good or service differently, leaving almost no classification of a particular good undisputed, which clearly foreshadows the illusory character of the whole distinction.[7] Nonetheless, some examples that enjoy particularly popular status as public goods are the fire brigade that stops a neighbor's house from catching fire, thereby letting him profit from my fire brigade, even though he did not contribute anything to financing it; or the police that, by walking around my property scare away potential burglars from my neighbor's property as well, even if he did not help finance the patrols; or the lighthouse, an example particularly dear to economists,[8] that helps a ship find her way even though the ship's owner did not contribute a penny to its construction or upkeep.

Before continuing with the presentation and critical examination of the theory of public goods, let me investigate how useful the distinction between private and public goods is in helping decide what should be produced privately and what by the state or with state help. Even the most superficial analysis could not fail to point out that using the alleged criterion of inexcludability, rather than presenting a sensible solution, would get one into deep trouble. While at least at first glance it seems that some of the state-provided goods and services might indeed qualify as public goods, it certainly is not obvious how many of the goods and services that are actually produced by states could come under the heading of public goods. Railroads, postal services, telephone, streets, and the like seem to be goods whose usage can be restricted to the persons who actually finance them, and hence appear to be private goods. And the same seems to be the case regarding many aspects of the multidimensional "good security": everything for which insurance could be taken out would have to qualify as a private good. Yet this does not suffice. Just as a lot of state-provided goods appear to be private goods, so many privately

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produced goods seem to fit in the category of a public good. Clearly my neighbors would profit from my well-kept rose garden—they could enjoy the sight of it without ever helping me garden. The same is true of all kinds of improvements that I could make on my property that would enhance the value of neighboring property as well. Even those people who do not throw money in his hat can profit from a street musician's performance. Those fellow passengers on the bus who did not help me buy it profit from my deodorant. And everyone who ever meets me would profit from my efforts, undertaken without their financial support, to turn myself into a most lovable person. Now, do all these goods—rose gardens, property improvements, street music, deodorants, personal improvements—since they clearly seem to possess the characteristics of public goods, then have to be provided by the state or with state assistance?

As these examples of privately produced public goods indicate, there is something seriously wrong with the thesis of public goods theorists that public goods cannot be produced privately, but instead require state intervention. Clearly they *can* be provided by markets. Furthermore, historical evidence shows us that all of the so-called public goods that states now provide have at some time in the past actually been provided by private entrepreneurs or even today are so provided in one country or another. For example, the postal service was once private almost everywhere; streets were privately financed and still are sometimes; even the beloved lighthouses were originally the result of private enterprise;[9] private police forces, detectives, and arbitrators exist; and help for the sick, the poor, the elderly, orphans, and widows has been a traditional concern of private charity organizations. To say, then, that such things cannot be produced by a pure market system is falsified by experience a hundredfold.

Apart from this, other difficulties arise when the public-private goods distinction is used to decide what and what not to leave to the market. For instance, what if the production of so-called public goods did not have positive but negative consequences for other people, or if the consequences were positive for some and negative for others? What if the neighbor whose house was saved from burning by my fire brigade had wished (perhaps because he was overinsured) that it had burned down; or my neighbors hate roses, or my fellow passengers find the scent of my deodorant disgusting? In addition, changes in the technology can change the character of a given good. For example, with the development of cable TV a good that was formerly (seemingly) public has become private. And changes in the laws of property—of the appropriation of property—can have the very same effect of changing the public-private character of a good. The lighthouse, for instance, is a public good only insofar as the sea is publicly (not privately) owned. But if it were permitted to acquire pieces of the ocean as private property, as it would be in a purely capitalist social order, then as the lighthouse shines over only a limited territory, it would clearly become possible to exclude nonpayers from the enjoyment of its services.

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Leaving this somewhat sketchy level of discussion and looking into the distinction between private and public goods more thoroughly, we discover that the distinction turns out to be completely illusory. A clear-cut dichotomy between private and public goods does not exist, and this is essentially why there can be so many disagreements on how to classify a given good. All goods are more or less private or public and can—and constantly do—change with respect to their degree of privateness/publicness as people's values and evaluations change, and as changes occur in the composition of the population. In order to recognize that they never fall, once and for all, into either one or the other category, one must only recall what makes something a good. For something to be a good it must be recognized and treated as scarce by someone. Something is not a good as such, that is to say; goods are goods only in the eyes of the beholder. Nothing is a good unless at least one person subjectively evaluates it as such. But then, when goods are never goods-as-such—when no physicochemical analysis can identify something as an economic good—there is clearly no fixed, objective criterion for classifying goods as either private or public. They can never be private or public goods as such. Their private or public character depends on how few or how many people consider them to be goods, with the degree to which they are private or public changing as these evaluations change and ranging from one to infinity. Even seemingly completely private things like the interior of my apartment or the color of my underwear can thus become public goods as soon as somebody else starts caring about them.[10] And seemingly public goods, like the exterior of my house or the color of my overalls, can become extremely private goods as soon as other people stop caring about them. Moreover, every good can change its characteristics again and again; it can even turn from a public or private good to a public or private bad or evil and vice versa, depending solely on the changes in this caring or uncaring. If this is so, then no decision whatsoever can be based on the classification of goods as private or public.[11] In fact, to do so it would become necessary to ask virtually every individual person with respect to every single good whether or not he happened to care about it—positively or negatively and perhaps to what extent—in order to determine who might profit from what and who should therefore participate in the good's financing. (And how could one know if they were telling the truth?) It would also become necessary to monitor all changes in such evaluations continuously, with the result that no definite decision could ever be made regarding the production of anything, and as a consequence of a nonsensical theory all of us would be long dead.[12]

But even if one were to ignore all these difficulties, and were willing to admit for the sake of argument that the private-public good distinction does hold water, even then the argument would not prove what it is supposed to. It neither provides conclusive reasons why public goods—assuming that they exist as a separate category of goods—should be produced at all, nor why the state rather than private enterprises should produce them. This is what the theory of public goods essen-

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tially says, having introduced the aforementioned conceptual distinction: The positive effects of public goods for people who do not contribute anything to their production or financing proves that these goods are desirable. But evidently they would not be produced, or at least not in sufficient quantity and quality, in a free, competitive market, since not all of those who would profit from their production would also contribute financially to make the production possible. So in order to produce these goods (which are evidently desirable, but would not be produced otherwise), the state must jump in and assist in their production. This sort of reasoning, which can be found in almost every textbook on economics (Nobel laureates not excluded[13]) is completely fallacious and fallacious on two counts.

For one thing, to come to the conclusion that the state has to provide public goods that otherwise would not be produced, one must smuggle a norm into one's chain of reasoning. Otherwise, from the statement that because of some special characteristics they have, certain goods would not be produced, one could never reach the conclusion that these goods *should* be produced. But with a norm required to justify their conclusion, the public goods theorists clearly have left the bounds of economics as a positive, *wertfrei* science. Instead they have moved into the realm of morals or ethics, and hence one would expect to be offered a theory of ethics as a cognitive discipline in order for them to do legitimately what they are doing and to justifiably derive their conclusion. But it can hardly be stressed enough that nowhere in the public goods theory literature can there be found anything that even faintly resembles such a cognitive theory of ethics.[14] Thus it must be stated at the outset, that the public goods theorists are misusing whatever prestige they might have as positive economists for pronouncements on matters on which, as their own writings indicate, they have no authority whatsoever. Perhaps, though, they have stumbled on something correct by accident, without having supported it with an elaborate moral theory? It becomes apparent that nothing could be further from the truth as soon as one explicitly formulates the norm that would be needed to arrive at the conclusion that the state has to assist in the provision of public goods. The norm required to reach the above conclusion is this: Whenever one can somehow prove that the production of a particular good or service has a positive effect on someone else but would not be produced at all or would not be produced in a definite quantity or quality unless certain people participated in its financing, then the use of aggressive violence against these persons is allowed, either directly or indirectly with the help of the state, and these persons may be forced to share in the necessary financial burden. It does not need much comment to show that chaos would result from implementing this rule, as it amounts to saying that anyone can attack anyone else whenever he feels like it. Moreover, as I have demonstrated in detail elsewhere[15] this norm could never be justified as a fair norm. To argue so, in fact to argue at all, in favor of or against anything, be it a moral, nonmoral, empirical, or logico-analytical position, it must be presupposed that contrary to what the norm actually

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says, each individual's integrity as a physically independent decision-making unit is assured. For only if everyone is free from physical aggression by everyone else could anything first be said and then agreement or disagreement on anything possibly reached. The principle of nonaggression is thus the necessary precondition for argumentation and possible agreement and hence can be argumentatively defended as a just norm by means of a priori reasoning.

But the public goods theory breaks down not only because of the faulty moral reasoning implied in it. Even the utilitarian, economic reasoning contained in the above argument is blatantly wrong. As the public goods theory states, it might well be that it would be better to have the public goods than not to have them, though it should not be forgotten that no a priori reason exists that this must be so of necessity (which would then end the public goods theorists' reasoning right here). For it is clearly possible, and indeed known to be a fact, that anarchists exist who so greatly abhor state action that they would prefer not having the so-called public goods at all to having them provided by the state.[16] In any case, even if the argument is conceded so far, to leap from the statement that the public goods are desirable to the statement that they should therefore be provided by the state is anything but conclusive, as this is by no means the choice with which one is confronted. Since money or other resources must be withdrawn from possible alternative uses to finance the supposedly desirable public goods, the only relevant and appropriate question is whether or not these alternative uses to which the money could be put (that is, the private goods which could have been acquired but now cannot be bought because the money is being spent on public goods instead) are more valuable—more urgent—than the public goods. And the answer to this question is perfectly clear. In terms of consumer evaluations, however high its absolute level might be, the value of the public goods is relatively lower than that of the competing private goods because if one had left the choice to the consumers (and had not forced one alternative upon them), they evidently would have preferred spending their money differently (otherwise no force would have been necessary). This proves beyond any doubt that the resources used for the provision of public goods are wasted because they provide consumers with goods or services that at best are only of secondary importance. In short, even if one assumed that public goods that can be distinguished clearly from private goods existed, and even if it were granted that a given public good might be useful, public goods would still compete with private goods. And there is only one method for finding out whether or not they are more urgently desired and to what extent, or mutatis mutandis, if, and to what extent, their production would take place at the expense of the nonproduction or reduced production of more urgently needed private goods: by having *everything* provided by freely competing private enterprises. Hence, contrary to the conclusion arrived at by the public goods theorists, logic forces one to accept the result that only a pure market system can safeguard the rationality, from the point of view of the con-

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sumers, of a decision to produce a public good. And only under a pure capitalist order could it be ensured that the decision about how much of a public good to produce (provided it should be produced at all) would be rational as well.[17] No less than a semantic revolution of truly Orwellian dimensions would be required to come up with a different result. Only if one were willing to interpret someone's "no" as really meaning "yes," the "non-buying of something" as meaning that it is really "preferred over that which the nonbuying person does instead of non-buying," of "force" really meaning "freedom," of "noncontracting" really meaning "making a contract" and so on, could the public goods theorists' point be "proven."[18] But then, how could we be sure that they really mean what they seem to mean when they say what they say, and do not rather mean the exact opposite, or don't mean anything with a definite content at all, but are simply babbling? We could not! M. N. Rothbard is thus completely right when he comments on the endeavors of the public goods ideologues to prove the existence of so-called market failures due to the nonproduction or a quantitatively or qualitatively "deficient" production of public goods. He writes, "such a view completely misconceives the way in which economic science asserts that free-market action is *ever* optimal. It is optimal, not from the standpoint of the personal ethical views of an economist, but from the standpoint of free, voluntary actions of all participants and in satisfying the freely expressed needs of the consumers. Government interference, therefore, will necessarily and always move away from such an optimum."[19]

Indeed, the arguments supposedly proving market failures are nothing short of patently absurd. Stripped of their disguise of technical jargon all they prove is this: A market is not perfect, as it is characterized by the nonaggression principle imposed on conditions marked by scarcity, and so certain goods or services that could only be produced and provided if aggression were allowed will not be produced. True enough. But no market theorist would ever dare deny this. Yet, and this is decisive, this "imperfection" of the market can be defended, morally as well as economically, whereas the supposed "perfections" of markets propagated by the public goods theorists cannot.[20] It is true enough, too, that a termination of the state's current practice of providing public goods would imply some change in the existing social structure and the distribution of wealth. And such a reshuffling would certainly imply hardship for some people. As a matter of fact, this is precisely why there is widespread public resistance to a policy of privatizing state functions, even though in the long run overall social wealth would be enhanced by this very policy. Surely, however, this fact cannot be accepted as a valid argument demonstrating the failure of markets. If a man has been allowed to hit other people on the head and is now not permitted to continue with this practice, he is certainly hurt. But one would hardly accept *that* as a valid excuse for upholding the old (hitting) rules. He is harmed, but harming him means substituting a social order in which every consumer has an equal right

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to determine what and how much of anything is produced, for a system in which some consumers have the right to determine in what respect other consumers are not allowed to buy voluntarily what they want with the means justly acquired by them and at their disposal. And certainly, such a substitution would be preferable from the point of view of all consumers as voluntary consumers.

By force of logical reasoning, then, one must accept Molinari's conclusion that for the sake of consumers, all goods and services be provided by markets.[21] It is not only false that clearly distinguishable categories of goods exist, which would render special amendments to the general thesis of capitalism's economic superiority necessary; even if they did exist, no special reason could be found why these supposedly special public goods should not also be produced by private enterprises, since they invariably stand in competition with private goods. In fact, in spite of all the propaganda from the public goods theorists, the greater efficiency of markets as compared with the state is increasingly realized with respect to more and more of the alleged public goods. Confronted daily with experience, hardly anyone seriously studying these matters could deny that nowadays markets could produce postal services, railroads, electricity, telephone, education, money, roads and so on more effectively than the state, i.e., more to the liking of consumers. Yet people generally shy away from accepting in one particular sector what logic forces upon them: in the production of security. Hence, for the rest of this article I will turn my attention to explaining the superior functioning of a capitalist economy in this particular area—a superiority whose logical case has already been made by now, but which shall be rendered more persuasive once some empirical material is added to the analysis and it is studied as a problem in its own right.[22]

How would a system of non-monopolistic, competing producers of security work? It should be clear from the outset that in answering this question one is leaving the realm of purely logical analysis and hence the answers must of necessity lack the certainty, the apodictic character of pronouncements on the validity of the public goods theory. The problem faced is precisely analogous to that of asking how a market would solve the problem of hamburger production, especially if up to this point hamburgers had been produced exclusively by the state and hence no one could draw on past experience. Only tentative answers could be formulated. No one could possibly know the exact structure of the hamburger industry—how many competing companies would come into existence, what importance this industry might have compared to others, what the hamburgers would look like, how many different sorts of hamburgers would appear on the market and perhaps disappear again because of a lack of demand, and so on. No one could know all of the circumstances and the changes that would influence the very structure of the hamburger industry—changes in the demands of various consumer groups, changes in technology, changes in the prices of various goods that affect the industry directly or indirectly, and so on. It must be stressed that although similar issues arise concerning the private production of security, this by no means implies

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that nothing definitive can be said. Assuming certain general conditions of demand for security services (conditions that more or less realistically reflect the world as it presently is) what can and will be said is how different social orders of security production, characterized by different structural constraints under which they have to operate, will respond differently.[23] Let me first analyze the specifics of monopolistic, state-run security production, as at least in this case one can draw on ample evidence regarding the validity of the conclusions reached, and then compare this system with what could be expected if it were replaced by a non-monopolistic one.

Even if security is considered to be a public good, in the allocation of scarce resources it must compete with other goods. What is spent on security can no longer be spent on other goods that also might increase consumer satisfaction. Moreover, security is not a single, homogeneous good, but rather consists of numerous components and aspects. There is not only prevention of crime, detection of criminals, and enforcement of the law, but there is also security from robbers, rapists, polluters, natural disasters, and so on. Moreover, security is not produced in a "lump," but can be supplied in marginal units. In addition, different people attach different importance to security as a whole, and also to different aspects of the whole thing, depending on their personal characteristics, their past experiences with various factors of insecurity, and the time and place in which they happen to live.[24] Now, and here I address the fundamental economic problem of allocating scarce resources to competing uses, how can the state—an organization not financed exclusively by voluntary contributions and the sales of its products but rather partially or even wholly by taxes—decide how much security to produce, how much of each of its countless aspects, to whom and where to provide how much of what? The answer is that it has no rational way to decide this question. From the point of view of the consumers, its response to their security demands must thus be considered arbitrary. Do we need one policeman and one judge, or 100,000 of each? Should they be paid $100 a month or $10,000? Should the policemen, however many we might have, spend more time patrolling the streets, chasing robbers, and recovering stolen loot, or spying on participants in victimless crimes such as prostitution, drug use, or smuggling? And should the judges spend more time and energy hearing divorce cases, traffic violations, cases of shoplifting, and murder, or antitrust cases? Clearly, all of these questions must be answered somehow because as long as there is scarcity and we do not live in the Garden of Eden, the time and money spent on one thing cannot be spent on another. The state must answer these questions, too, but whatever it does, it does it *without* being subject to the profit-and-loss criterion. Hence, its action is arbitrary and necessarily involves countless wasteful misallocations from the consumer's viewpoint.[25] Independent to a large degree of consumer wants, the state-employed security producers instead do, as everyone knows, what *they* like. They hang around instead of doing anything, and if they do work

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they prefer doing what is easiest or work where they can wield power rather than serving consumers. Police officers drive around a lot in cars, hassle petty traffic violators, and spend huge amounts of money investigating victimless crimes that many people (i.e., nonparticipants) do not like but that few would be willing to spend their money on to fight, as they are not immediately affected by them. Yet with respect to what consumers want most urgently—the prevention of hard-core crime (i.e., crimes *with* victims), the apprehension and effective punishment of hard-core criminals, the recovery of loot, and the securement of compensation of victims of crimes from the aggressors—the police are notoriously inefficient, in spite of ever higher budget allocations.

Further, whatever state-employed police or judges happen to do (arbitrary as it must be), they will tend to do poorly because their income is more or less independent of the consumers' evaluations of their services. Thus one observes police arbitrariness and brutality and the slowness in the judicial process. Moreover, it is remarkable that neither the police nor the judicial system offers consumers anything even faintly resembling a service contract in which it is laid down in unambiguous terms what procedure the consumer can expect to be set in motion in a specific situation. Rather, both operate in a contractual void that over time allows them to change their rules of procedure arbitrarily and that explains the truly ridiculous fact that the settlement of disputes between police and judges on the one hand and private citizens on the other is not assigned to an independent third party, but to another policeman or judge who shares employers with one party—the government—in the dispute.

Third, anyone who has seen state-run police stations and courts, not to mention prisons, knows how true it is that the factors of production used to provide us with such security are overused, badly maintained, and filthy. Since no one using these factors of production actually owns them (no one can sell them and privately appropriate the receipts from sale) and losses (and gains) in the value embodied in the capital used are thus socialized, everybody will tend to increase his private income resulting from the use of the factors *at the expense* of losses in capital value. Hence, marginal cost will increasingly tend to exceed the value of marginal product, and an overutilization of capital will result. And if, in an exceptional case, this happens not to be so and an overutilization should not be apparent, then this has only been possible at costs that are comparatively much higher than those of any similar private business.[26]

Without a doubt, all of these problems inherent in a system of monopolistic security production would be solved relatively quickly once a given demand for security services was met by a competitive market with its entirely different incentive structure for producers. This is not to say that a "perfect" solution to the problem of security would be found. There would still be robberies and murders; and not all loot would be recovered nor all murderers caught. But in terms of consumer evaluations the situation would improve to the extent that the

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nature of man would allow it to improve. First, as long as there is a competitive system, i.e., as long as the producers of security services depend on voluntary purchases, most of which probably take the form of service and insurance contracts agreed to in advance of any actual "occurrence" of insecurity or aggression, no producer could increase its income without improving services or quality of product as perceived by the consumers. Furthermore, all security producers taken together could not bolster the importance of their particular industry unless, for whatever reason, consumers indeed started evaluating security more highly than other goods, thus ensuring that the production of security would never and nowhere take place at the expense of the non- or reduced production of, let us say, cheese, as a competing private good. In addition, the producers of security services would have to diversify their offerings to a considerable degree because a highly diversified demand for security products among millions and millions of consumers exists. Directly dependent on voluntary consumer support, they would immediately be hurt financially if they did not appropriately respond to the consumers' various wants or change in wants. Thus every consumer would have a direct influence, albeit small, on the output of goods appearing on or disappearing from the security market. Instead of offering a uniform "security packet" to everyone, a characteristic of state production policy, a multitude of service packages would appear on the market. They would be tailored to the different security needs of different people, taking account of different occupations, different risk-taking behavior, different needs for protection and insurance, and different geographical locations and time constraints.

But that is far from all. Besides diversification, the content and quality of the products would improve, too. Not only would the treatment of consumers by the employees of security enterprises improve immediately, the "I-could-care-less" attitude, the arbitrariness and even brutality, the negligence and tardiness of the present police and judicial systems would ultimately disppear. Since policemen and judges would be dependent on voluntary consumer support, any instances of maltreatment of consumers, of impoliteness or ineptness could cost them their job. Further, the peculiarity that the settlement of disputes between a client and his business partner is invariably entrusted to the latter's judgment, would almost certainly disappear from the books, and conflict arbitration by independent parties would become the standard offered by producers of security. Most importantly, in order to attract and retain customers the producers of such services would have to offer *contracts* that would allow the consumer to know what he was buying and enable him to raise a valid, intersubjectively ascertainable complaint if the actual performance of the security producer did not live up to the contract. And more specifically, insofar as they are not individualized service contracts where payment is made by a customer for covering his own risks exclusively, but rather insurance contracts proper that require pooling one's own risks with those of other people, contrary to the present statist practice, these contracts most certainly would

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no longer contain any deliberately built-in redistributive scheme favoring one group of people at the expense of another. Otherwise, if anyone had the feeling that the contract offered to him required his paying for other people's peculiar needs and risks—factors of possible insecurity, that is, that he did not perceive as applicable to his own case—he would simply reject signing it or discontinue his payments.

Yet when all this is said, the question will inevitably surface, "Wouldn't a competitive system of security production necessarily result in permanent social conflict, in chaos and anarchy?" Several responses can be made to this question. First, it should be noted that such an impression would by no means be in accordance with historical, empirical evidence. Systems of competing courts have existed at various places (e.g., in ancient Ireland or at the time of the Hanseatic League) before the arrival of the modern nation state, and as far as we know they worked well.[27] Judged by the then existent crime rate (crime per capita), the private police in the so-called Wild West (which incidentally was not as wild as some movies imply) were relatively more successful than today's state-supported police.[28] And turning to contemporary experience and examples, millions and millions of international contacts exist even now—contacts of trade and travel—and it certainly seems to be an exaggeration to say, for instance, that there is more fraud, more crime, more breach of contract there than in domestic relations. And this, it should be noted, without there being one big monopolistic security producer and lawmaker. Finally it is not to be forgotten that even now in a great number of countries there are various private security producers alongside the state: private investigators, insurance detectives, and private arbitrators. Their work seems to confirm the thesis that they are more, not less, successful in resolving social conflicts than their public counterparts.

However, this historical evidence is very much subject to dispute, in particular regarding whether any general information can be derived from it. Yet there are systematic reasons, too, why the fear expressed by the question is not well-founded. Paradoxical as it may seem establishing a competitive system of security producers implies erecting an institutionalized incentive structure to produce an order of law and law-enforcement that embodies the highest possible degree of consensus regarding the question of conflict resolution. Such a structure will tend to generate *less* rather than more social unrest and conflict than would occur under monopolistic auspices.[29] In order to understand this paradox, it is necessary to take a closer look at the only typical situation that concerns the skeptic and that allows him to believe in the superior virtue of a monopolistically organized order of security production: when a conflict arises between A and B, both are insured by different companies and the companies cannot come to an immediate agreement regarding the validity of the conflicting claims brought forward by their respective clients. (No problem would exist if such an agreement were reached or if both clients were insured by one and the same company—at least the problem

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then would not be different in any way from that emerging under a statist monopoly.) Wouldn't such a situation always result in a shoot-out? This is highly unlikely. First, any violent battle between companies would be costly and risky, in particular if these companies had reached a respectable size (which would be important for them to have in order to appear as effective guarantors of security to their prospective clients in the first place). More importantly, under a competitive system with each company dependent on the continuation of voluntary consumer payments, any battle would have to be deliberately supported by each and every client of both companies. If there were only one person who withdrew his payments because he was not convinced a battle was necessary in the particular conflict at hand, there would be immediate economic pressure on the company to look for a peaceful solution to the conflict.[30] Hence any competitive producer of security would be extremely cautious about engaging in violent measures in order to resolve conflicts. Rather, to the extent that it is peaceful conflict resolution that consumers want, each and every security producer would go to great lengths to provide it to its clients and to establish in advance, for everyone to know, to what arbitration process it would be willing to submit itself and its clients in case of a disagreement over the evaluation of conflicting claims. And as such a scheme could appear to the clients of different firms to be working only if there were agreement among them regarding such arbitrational measures, a system of law governing relations between companies that would be universally acceptable to the clients of all of the competing security producers would naturally evolve. Moreover, the economic pressure to generate rules representing a consensus on how conflicts should be handled is even more far-reaching. Under a competitive system, the independent arbitrators who would be entrusted with the task of finding peaceful solutions to conflicts would be dependent on the continued support of the two disputing companies insofar as the companies could and would select different judges if either one of them were sufficiently dissatisfied with the outcome of the arbitration work. Thus, these judges would be under pressure to find solutions to the problems handed over to them that, this time not with respect to the procedural aspects of law but its content, would be acceptable to all of the clients of the firms involved.[31] Otherwise one or all of the companies might lose customers, thus inducing those firms to turn to different arbitrators the next time they were in need of one.[32]

But wouldn't it be possible under a competitive system for a security producing firm to become an outlaw company—a firm, that is, which, supported by its own clients, started aggressing against others? There is certainly no way to deny that this might be possible, though again it must be emphasized that here one is in the realm of empirical social science and no one could know such a thing with certainty. And yet the tacit implication that the possibility that a security firm could become an outlaw company somehow indicates a severe deficiency in the philosophy and economics of a pure capitalist social order is fallacious.[33]

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First, it should be recalled that any social system, a statist-socialist order no less than a pure market economy, is dependent for its continued existence on public opinion and that a given state of public opinion at all times delimits what can or cannot occur as well as what is more or less likely to occur. The current state of public opinion in West Germany, for instance, makes it highly unlikely or even impossible that a statist-socialist system of the current Soviet type could be imposed on the West German public. The lack of public support for such a system would doom it to failure and make it collapse. And it is even more unlikely that any attempt to impose a Soviet-type order could ever hope to succeed among Americans, given American public opinion. Hence, in order for us to see the problem of outlaw companies correctly, the above question should be phrased as follows: How likely is it that any such event would occur in a given society with its specific state of public opinion? Formulated in this way, it is clear that the answer would have to be different for different societies. For some, characterized by socialist ideas deeply entrenched in the public, there would be a greater likelihood of the reemergence of aggressor companies, and for other societies there would be a much smaller chance of this happening. But then, would the prospect of a competitive system of security production in any given case be better or worse than that of the continuation of a statist system? Let us look, for instance, at the present-day United States. Assume that by a legislative act the state had abolished its right to provide security with tax funds and a competitive system of security production was introduced. Given the state of public opinion, how likely would it then be that outlaw producers would spring up, and what if they did? Evidently, the answer would depend on the reactions of the public to this changed situation. Thus, the first reply to those challenging the idea of a private market for security would have to be: What about you? What would your reaction be? Does your fear of outlaw companies mean that you would then go out and engage in trade with a security producer that aggressed against other people and their property, and would you continue supporting it if it did? Certainly the critic would be much muted by this counterattack. But more important than this is the systematic challenge implied in this personal counterattack. Evidently, the described change in the situation would imply a change in the cost-benefit structure that everyone would face once he had to make his decisions. Before the introduction of a competitive system of security production, it had been legal to participate in and support (state) aggression. Now such an activity would be an illegal activity. Hence, given one's conscience, which makes each of one's own decisions appear more or less costly, i.e., more or less in harmony with one's own principles of correct behavior, support for a firm engaging in the exploitation of people unwilling to deliberately support its actions would be more costly now than before. Given this fact, it must be assumed that the number of people, among them even those who otherwise would have readily lent their support to the state, who would now spend their money to support a firm committed to honest

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business would rise and would rise everywhere this social experiment was tried. In contrast, the number of people still committed to a policy of exploitation, of gaining at the expense of others, would fall. How drastic this effect would be would of course depend on the state of public opinion. In the example at hand—the United States, where the natural theory of property is extremely widespread and accepted as a private ethic, the libertarian philosophy being essentially the ideology on which the country was founded and that led it to the height it reached[34]—the effect would naturally be particularly pronounced. Accordingly, security producing firms committed to the philosophy of protecting and enforcing libertarian law would attract the greatest bulk of public support and financial assistance. And while it may be true that some people, and among them especially those who had profited from the old order, might continue their support of a policy of aggression, it is very unlikely that they would be sufficient in number and financial strength to succeed in doing so. Rather, the likely outcome would be that the honest companies would develop the strength needed—alone or in a combined effort and supported in this effort by their own voluntary customers—to check any such emergence of outlaw producers and destroy them wherever and whenever they came into existence.[35]

NOTES

1. Gustave de Molinari, *The Production of Security*, trans. J. Huston McCulloch (New York: The Center for Libertarian Studies, 1977), p. 3.
2. Ibid., p. 4.
3. For various approaches of public goods theorists, see J. Buchanan and G. Tullock, *The Calculus of Consent*, (Ann Arbor, 1961); J. Buchanan, *The Public Finances* (Homewood, 1970); the same, *The Limits of Liberty* (Chicago, 1975); G. Tullock, *Private Wants, Public Means* (New York, 1970); M. Olson, *The Logic of Collective Action* (New York, 1965); W. Baumol, *Welfare Economics and the Theory of the State* (Cambridge, 1952).
4. See on the following, M. N. Rothbard, *Man, Economy and State* (Los Angeles, 1970), pp. 883ff.; the same, "The Myth of Neutral Taxation," *Cato Journal* (1981); W. Block, "Free Market Transportation: Denationalizing the Roads," *Journal of Libertarian Studies* (1979); the same, "Public Goods and Externalities: The Case of Roads," *Journal of Libertarian Studies* (1983).
5. Cf. for instance, W. Baumol and A. Blinder, *Economics, Principles and Policy* (New York, 1979), chap. 31.
6. Another frequently used criterion for public goods is that of "nonrivalrous consumption." Generally, both criteria seem to coincide: When free riders cannot be excluded, nonrivalrous consumption is possible; and when they can be excluded, consumption becomes rivalrous, or so it seems. However, as public goods theorists argue, this coincidence is not perfect. It is, they say, conceivable that while the exclusion of free riders might be possible, their inclusion might not be connected with any additional cost (the marginal cost of admitting free riders is zero, that is), and that the consumption of the good in question by the additionally admitted free rider will not necessarily lead to a subtraction in the consumption of the good available to others. Such a good would be a public good, too. And since exclusion would be practiced on the free market and the good would not become available for nonrivalrous consumption to everyone it otherwise could—even though this would require no additional costs—this, according to statist-socialist logic, would prove a market failure, i.e., a suboptimal level of consumption. Hence the state would have to take over the provision of such goods. (A movie theater, for instance, might be

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only half full, so it might be "costless" to admit additional viewers free of charge, and their watching the movie also might not affect the paying viewers; hence the movie would qualify as a public good. Since, however, the owner of the theater would be engaging in exclusion, instead of letting free riders enjoy a "costless" performance, movie theaters would be ripe for nationalization.) On the numerous fallacies involved in defining public goods in terms of nonrivalrous consumption see notes 12 and 17 below.

7. On this subject W. Block, "Public Goods and Externalities," *Journal of Libertarian Studies* (1983).
8. See for instance J. Buchanan, *The Public Finances* (Homewood, 1970), p. 23; P. Samuelson, *Economics* (New York, 1976), p. 160.
9. See R. Coase, "The Lighthouse in Economics, *Journal of Law and Economics* (1974).
10. See, for instance, the ironic case that W. Block makes for socks being public goods in "Public Goods and Externalities," *Journal of Libertarian Studies* (1983).
11. To avoid any misunderstanding here, every single producer and every association of producers making joint decisions can, at any time, decide whether or not to produce a good based on an evaluation of the privateness or publicness of the good. In fact, decisions on whether or not to produce public goods privately are constantly made within the framework of a market economy. What is impossible is to decide whether or not to ignore the outcome of the operation of a free market based on the assessment of the degree of privateness or publicness of a good.
12. In fact, then, the introduction of the distinction between private and public goods is a relapse into the presubjectivist era of economics. From the point of view of subjectivist economics, no good exists that can be categorized objectively as private or public. This is essentially why the second proposed criterion for public goods—permitting nonrivalrous consumption (see note 6 above)—breaks down too. For how could any outside observer determine whether or not the admittance of an additional free rider at no charge would not indeed lead to a subtraction in the consumption of a good to others? Clearly there is no way that he could objectively do so. In fact, it might well be that one's enjoyment of a movie or of driving on a road would be considerably reduced if more people were allowed in the theater or on the road. Again, to find out whether or not this is the case one would have to ask every individual—and not everyone might agree (what then?). Furthermore, since even a good that allows nonrivalrous consumption is not a free good, as a consequence of admitting additional free riders "crowding" would *eventually* occur, and hence everyone would have to be asked about the appropriate "margin." In addition, my consumption may or may not be affected depending on *who* it is that is admitted free of charge, so I would have to be asked about this, too. And finally, everyone might change his opinion on all of these questions over time. It is thus in the same way impossible to decide whether or not a good is a candidate for state (rather than private) production based on the criterion of nonrivalrous consumption as on that on non-excludability (see also note 17 below).
13. See P. Samuelson, "The Pure Theory of Public Expenditure," *Review of Economics and Statistics* (1954); the same, *Economics* (New York, 1976), chap. 8; M. Friedman, *Capitalism and Freedom* (Chicago, 1962), chap. 2; F. A. Hayek, *Law, Legislation and Liberty*, vol. 3, (Chicago, 1979), chap. 14.
14. Economists in recent years, particularly the Chicago school, have been increasingly concerned with the analysis of property rights (H. Demsetz, "The Exchange and Enforcement of Property Rights," *Journal of Law and Economics* (1964); the same, "Toward a Theory of Property Rights," *American Economic Review*, (1967); R. Coase, "The Problem of Social Cost," *Journal of Law and Economics* (1960); A. Alchian, *Economics Forces at Work* (Indianapolis, 1977), part 2; R. Posner, *Economic Analysis of Law* (Boston, 1977)). Such analyses, however, have nothing to do with ethics. On the contrary, they represent attempts to substitute economic efficiency considerations for the establishment of justifiable ethical principles (on the critique of such endeavors see M. N. Rothbard, *The Ethics of Liberty*, (Atlantic Highlands, 1982), chap. 26; W. Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies* (1977); R. Dworkin, "Is Wealth a Value," *Journal of Legal Studies* (1980); M. N. Rothbard, "The Myth of Efficiency," M. Rizzo, ed., *Time, Uncertainty, and Disequilibrium* (Lexington, 1979)). Ultimately, all efficiency arguments are irrelevant because there simply exists no nonarbitrary way of measuring, weighing, and aggregating individual utilities or disutilities that result from some given allocation of property rights. Hence any attempt to recommend some particular system of assigning property rights in terms of its alleged maximization of "social welfare" is pseudo-

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scientific humbug (see in particular, M. N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," (New York: Center for Libertarian Studies, 1977); also, L. Robbins, "Economics and Political Economy," *American Economic Review,* (1981)).

The "Unanimity Principle" which J. Buchanan and G. Tullock, following K. Wicksell (*Finanztheoretische Untersuchungen,* Jena, 1896), have repeatedly proposed as a guide for economic policy is also not to be confused with an ethical principle proper. According to this principle only such policy changes should be enacted which can find unanimous consent—and that surely sounds attractive; but then, mutatis mutandis, it also determines that the status quo be preserved if there is less than unanimous agreement on any proposal of change—and that sounds far less attractive, because it imples that any given, present state of affairs regarding the allocation of property rights must be legitimate either as a point of departure or as a to-be-continued-state. However, the public choice theorists offer no justification in terms of a normative theory of property rights for this daring claim as would be required. Hence, the unanimity principle is ultimately without ethical foundation. In fact, because it would legitimize any conceivable status quo, the Buchananites most favored principle is no less than outrightly absurd as a moral criterion (cf. on this also M. N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, 1982), ch. 26; the same, "The Myth of Neutral Taxation: in *Cato Journal* (1981), p. 549f).

Whatever might still be left for the unanimity principle, Buchanan and Tullock, following the lead of Wicksell again, then give away by reducing it in effect to one of "relative" or "quasi" unanimity.

15. H.-H. Hoppe, "From the Economics of Laissez Faire to the Ethics of Libertarianism," in W. Block and L. Rockwell, eds., *Man, Economy and Liberty: Essays in Honor of Murray N. Rothbard* (Auburn, Ala., 1988), pp. 56–76.
16. See on this argument M. N. Rothbard, "The Myth of Neutral Taxation" *Cato Journal* (1981): 533. Incidentally, the existence of one single anarchist also invalidates all references to Pareto optimality as a criterion for economically legitimate state action.
17. Essentially the same reasoning that leads one to reject the socialist-statist theory built on the allegedly unique character of public goods as defined by the criterion of nonexcludability, also applies when, instead, such goods are defined by means of the criterion of nonrivalrous consumption (see notes 6 and 12 above). For one thing, in order to derive the normative statement that they *should* be so offered from the statement of fact that goods that allow nonrivalrous consumption would *not* be offered on the free market to as many consumers as could be, this theory would face exactly the same problem of requiring a justifiable ethics. Moreover, the utilitarian reasoning is blatantly wrong, too. To reason, as the public goods theorists do, that the free-market practice of excluding free riders from the enjoyment of goods that would permit nonrivalrous consumption at zero marginal costs would indicate a suboptimal level of social welfare and hence would require compensatory state action is faulty on two related counts. First, cost is a subjective category and can never be objectively measured by any outside observer. Hence, to say that additional free riders could be admitted at no cost is totally inadmissible. In fact, if the subjective costs of admitting more consumers at no charge were indeed zero, the private owner-producer of the good in question would do so. If he does not do so, this reveals that the costs for him are *not* zero. The reason may be his belief that to do so would reduce the satisfaction available to the other consumers and so would tend to depress the price for his product; or it may simply be his dislike for uninvited free riders as, for instance, when I object to the proposal that I turn over my less-than-capacity-filled living room to various self-inviting guests for nonrivalrous consumption. In any case, since for whatever reason the cost cannot be assumed to be zero, it is then fallacious to speak of a market failure when certain goods are not handed out free of charge. On the other hand, welfare losses would indeed become unavoidable if one accepted the public goods theorists' recommendation of letting goods that allegedly allow for nonrivalrous consumption to be provided free of charge by the state. Besides the insurmountable task of determining what fulfills this criterion, the state, independent of voluntary consumer purchases as it is, would first off face the equally insoluble problem of rationally determining *how much* of the public good to provide. Clearly, since even public goods are not free goods but are subject to "crowding" at some level of use, there is no stopping point for the state, because at any level of supply there would still be users who would have to be excluded and who, with a larger supply, could enjoy a free ride. But even if this problem could be solved miraculously,

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in any case the (necessarily inflated) cost of production and operation of the public goods distributed free of charge for nonrivalrous consumption would have to be paid for by taxes. And this then, i.e., the fact that consumers would have been coerced into enjoying their free rides, again proves beyond any doubt that these public goods, too, are of inferior value from the point of view of consumers to the competing private goods that they now no longer can acquire.

18. The most prominent modern champions of Orwellian double talk are J. Buchanan and G. Tullock (see their works cited in note 3 above). They claim that government is founded by a "constitutional contract" in which everyone "conceptually agrees" to submit to the coercive powers of government with the understanding that everyone else is subject to it too. Hence government is only *seemingly* coercive but *really* voluntary. There are several evident objections to this curious argument. First, there is no empirical evidence whatsoever for the contention that any constitution has ever been voluntarialy accepted by everyone concerned. Worse, the very idea of all people voluntarily coercing themselves is simply inconceivable, much in the same way as it is inconceivable to deny the law of contradiction. For if the voluntarily accepted coercion is *voluntary,* then it would have to be possible to revoke one's subjection to the constitution, and the state would be no more than a voluntarily joined club. If, however, one does not have the "right to ignore the state"—and that one does not have this right is, of course, the characteristic mark of a state as compared to a club—then it would be logically inadmissible to claim that one's acceptance of state coercion is voluntary. Furthermore, even if all this were possible, the constitutional contract could still not claim to bind anyone except the original signers of the constitution.

    How can Buchanan and Tullock come up with such absurd ideas? By a semantic trick. What was "inconceivable" and "no agreement" in pre-Orwellian talk is for them "conceptually possible" and a "conceptual agreement." For a most instructive short exercise in this sort of reasoning in leaps and bounds, see J. Buchanan, "A Contractarian Perspective on Anarchy," in the same, *Freedom in Constructional Contract* (College Station, 1977). Here were learn (p. 17) that even the acceptance of the 55 mph speed limit is possibly voluntary (Buchanan is not quite sure) since it ultimately rests on all of us conceptually agreeing on the constitution, and that Buchanan is not really a statist, but in truth an anarchist (p. 11).

19. M. N. Rothbard, *Man, Economy and State* (Los Angeles, 1970), p. 887.

20. This, first of all, should be kept in mind whenever one has to assess the validity of statist-interventionist arguments such as the following, by J. M. Keynes ("The End of Laissez Faire," in the same, *Collected Writings* (London 1972), vol. 9, p. 291): "The most important Agenda of the state relate not to those activities which private individuals are already fulfilling but to those functions which fall outside the sphere of the individual, to those decisions which are made by *no one* if the state does not make them. The important thing for government is not to do things which individuals are doing already and to do them a little better or a little worse: but to do those things which are not done at all." This reasoning not only *appears* phony, it truly is.

21. Some libertarian minarchists object that the existence of a market presupposes the recognition and enforcement of a common body of law, and hence a government as a monopolistic judge and enforcement agency. (see, for example, J. Hospers, *Libertarianism* (Los Angeles, 1971); T. Machan, *Human Rights and Human Liberties* (Chicago, 1975)). Now it is certainly correct that a market presupposes the recognition and enforcement of those rules that underlie its operation. But from this it does not follow that this task must be entrusted to a monopolistic agency. In fact, a common language or sign-system is also presupposed by the market; but one would hardly think it convincing to conclude that hence the government must ensure the observance of the rules of language. Like the system of language, then, the rules of market behavior emerge spontaneously and can be enforced by the "invisible hand" of self-interest. Without the observance of common rules of speech, people could not reap the advantages that communication offers, and without the observance of common rules of conduct, people could not enjoy the benefits of the higher productivity of an exchange economy based on the division of labor. In addition, as I indicated above, independent of any government the non-aggression principle underlying the operation of markets can be defended a priori as just. Moreover, as I will argue in the conclusion of this article, it is precisely a competitive system of law-administration and law-enforcement that generates the greatest possible pressure to elaborate and enact rules of conduct that incorporate the highest degree of *consensus* conceivable. And of course the very rules that do just this are those that a priori reasoning establishes as the logically necessary presupposition of argumentation and argumentative agreement.

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22. Incidentally, the same logic that would force one to accept the idea of the production of security by private business as economically the best solution to the problem of consumer satisfaction also forces one, so far as moral-ideological positions are concerned, to abandon the political theory of classical liberalism and take the small but nevertheless decisive step (from there) to the theory of libertarianism, or private property anarchism. Classical liberalism, with Ludwig von Mises as its foremost representative in this century, advocates a social system based on the nonaggression principle. And this is also what libertarianism advocates. But classical liberalism then wants to have this principle enforced by a monopolistic agency (the government, the state)—an organization, that is, which is not exclusively dependent on voluntary, contractual support by the consumers of its respective services, but instead has the right to unilaterally determine its own income, i.e., the taxes to be imposed on consumers in order to do its job in the area of security production. Now, however plausible this might sound, it should be clear that it is inconsistent. Either the principle of nonaggression is valid, in which case the state as a privileged monopolist is immoral, or business built on and around aggression—the use of force and of noncontractual means of acquiring resources—is valid, in which case one must toss out the first theory. It is impossible to sustain both contentions and not to be inconsistent unless, of course, one could provide a principle that is more fundamental than both the nonaggression principle and the state's right to aggressive violence and from which both, with the respective limitations regarding the domains in which they are valid, can be logically derived. However, liberalism never provided any such principle, nor will it ever be able to do so, since, to argue in favor of anything presupposes one's right to be free of aggression. Given the fact then that the principle of nonaggression cannot be argumentatively contested as morally valid without implicitly acknowledging its validity, by force of logic one is committed to abandoning liberalism and accepting instead its more radical child: libertarianism, the philosophy of pure capitalism, which demands that the production of security be undertaken by private business too.
23. On the problem of competitive security production, see Gustave de Molinari, "Production of Security"; M. N. Rothbard, *Power and Market* (Kansas City, 1977), chap. 1; the same, *For A New Liberty* (New York, 1978), chap. 12; W. C. Woolridge, *Uncle Sam the Monopoly Man* (New Rochelle, 1970), chaps. 5–6; M. and L. Tannehill, *The Market for Liberty* (New York, 1984), part 2.
24. Cf. M. Murck, *Soziologie der oeffentlichen Sicherheit* (Frankfurt, 1980).
25. To say that the process of resource allocation becomes arbitrary in the absence of the effective functioning of the profit-loss criterion does not mean that the decisions that somehow have to be made are not subject to any kind of constraint and hence are pure whim. They are not, and any such decisions face certain constraints imposed on the decision maker. If, for instance, the allocation of production factors is decided democratically, then it evidently must appeal to the majority. But if a decision is constrained in this way or if it is made in any other way, it is still arbitrary from the point of view of voluntarily buying or not-buying consumer.

    Regarding *democratically* controlled allocations, various deficiencies have become quite evident. As, for example, J. Buchanan and R. Wagner write (*The Consequences of Mr. Keynes* (London, 1978), p. 19), "Market Competition is continuous; at each purchase, a buyer is able to select among competing sellers. Political competition is intermittent; a decision is binding generally for a fixed number of years. Market competition allows several competitors to survive simultaneously . . . political competition leads to an all-or-nothing outcome. . . . in market competition the buyer can be reasonably certain as to just what it is that he will receive from his purchase. In political competition, the buyer is in effect purchasing the services of an agent, whom he cannot bind. . . . Moreover, because a politician needs to secure the cooperation of a majority of politicians, the meaning of a vote for a politician is less clear than that of a 'vote' for a private firm." (See also J. Buchanan, "Individual Choice in Voting and the Market", in the same, *Fiscal Theory and Political Economy* (Chapel Hill, 1962); for a more general treatment of the problem J. Buchanan and G. Tullock, *The Calculus of Consent* (Ann Arbor, 1962).

    What has commonly been overlooked, though,—especially by those who try to make a virtue of the fact that a democracy gives equal voting power to everyone, whereas consumer sovereignty allows for unequal "votes"—is the most important deficiency of all: Under a system of consumer sovereignty people might cast unequal votes but, in any case, they exercise control exclusively over things that they acquired through original appropriation or contract and hence are forced to act morally. Under a democracy of production everyone is assumed to have something to say

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regarding things one did not so acquire, and hence one is permanently invited thereby not only to create legal instability with all its negative effects on the process of capital formation, but, moreover, to act immorally. See on this also Ludwig von Mises, *Socialism* (Indianapolis, 1981), chap. 31.

26. Sums up Molinari ("Production of Security" pp. 13–14), "If . . . the consumer is not free to buy security wherever he pleases, you forthwith see open up a large profession dedicated to arbitrariness and bad management. Justice becomes slow and costly, the police vexatious, individual liberty is no longer respected, the price of security is abusively inflated and inequitably apportioned, according to the power and influence of this or that class of consumers."
27. See the literature cited in note 22; also B. Leoni, *Freedom and the Law* (Princeton, 1961); J. Peden, "Property Rights in Celtic Irish Law," *Journal of Libertarian Studies* (1977).
28. See T. Anderson and P. J. Hill, "The American Experiment in Anarcho-Capitalism: The *Not* So Wild, Wild West," *Journal of Libertarian Studies* (1980).
29. On the following, see H.-H. Hoppe, *Eigentum, Anarchie und Staat* (Opladen, 1986), chap. 5.
30. Contrast this with the state's policy of engaging in battles without having everyone's deliberate support because it has the right to tax people; and ask yourself if the risk of war would be lower or higher if one had the right to stop paying taxes as soon as one had the feeling that the state's handling of foreign affairs was not to one's liking.
31. And it may be noted here again that norms that incorporate the highest possible degrees of consensus are, of course, those that are presupposed by argumentation and whose acceptance makes consensus on anything at all possible, as indicated on p. 31–32.
32. Again, contrast this with state-employed judges who, because they are paid from taxes and so are relatively independent of consumer satisfaction, can pass judgments that are clearly not acceptable as fair by everyone; and ask yourself if the risk of not finding the truth in a given case would be lower or higher if one had the possibility of exerting economic pressure whenever one had the feeling that a judge who one day might have to adjudicate in one's own case had not been sufficiently careful in assembling and judging the facts of a case, or simply was an outright crook.
33. See on the following in particular M. N. Rothbard, *For A New Liberty* (New York, 1978), pp. 233ff.
34. See B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967); J. T. Main, *The Anti-Federalists: Critics of the Constitution* (Chapel Hill, 1961); M. N. Rothbard, *Conceived in Liberty* (New Rochelle, 1975–1979).
35. Naturally, insurance companies would assume a particularly important role in checking the emergence of outlaw companies. Note M. and L. Tannehill (pp. 110–11):

> "Insurance companies, a very important sector of any totally free economy, would have a special incentive to dissociate themselves from any aggressor and, in addition, to bring all their considerable business influence to bear against him. Aggressive violence causes value loss, and the insurance industry would suffer the major cost in most such value losses. An unrestrained aggressor is a walking liability, and no insurance company, however remotely removed from his original aggression, would wish to sustain the risk that he might aggress against one of its own clients next. Besides, aggressors and those who associate with them are more likely to be involved in situations of violence and are, thus, bad insurance risks. An insurance company would probably refuse coverage to such people out of a foresighted desire to minimize any future losses which their aggression might cause. But even if the company were not motivated by such foresight, it would still be forced to rate their premiums up drastically or cancel their coverage altogether in order to avoid carrying the extra risk involved in their inclination to violence. In a competitive economy, no insurance company could afford to continue covering aggressors and those who had dealings with aggressors and simply pass the cost on to its honest customers; it would soon lose these customers to more reputable firms which could afford to charge less for their insurance coverage."

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Anarchism and the Public Goods Issue: Law, Courts, and the Police

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In the early 1970s, James Buchanan and Gordon Tullock held a series of seminars examining anarchism as a feasible method of social organization (Tullock 1972b; Tullock 1974b). The general consensus was that that good which may be termed "security" is a public or collective good. Since "security" is both (a) essential for the very existence of any social order and (b) incapable of being supplied *voluntarily,* government, that agency with a (legitimate) monopoly on the use of compulsion and control, is indispensable.

Interestingly, numerous articles have appeared since then in *Public Choice* (Goldin; Moss; Kim and Walker; Isaak, Walker and Thomas; McCaleb and Wagner) and elsewhere (Brubaker; Marwell and Ames; Schneider and Pommerehne; Brownstein; Hoppe; Rothbard 1970–; Bendor and Mookherjee) that have called into question, on both conceptual and empirical grounds, the accepted wisdom regarding the concept of collective goods and its corollary, free riding. These articles would seem to call for a reassessment of the original "public choice" consensus on the feasibility of anarchism as a method of social organization, but to date no such reassessment has been forthcoming.

This paper is an attempt to use what is essentially "public choice" analysis—which assumes that individuals will make "rational" choices based on self-interest—to show how the primary collective good, security, might be provided noncoercively, i.e., in the absence of a state. For purposes of presentation, the broad concept of security will be subdivided into three components: (1) law, (2) the courts, and (3) the police.

The "public choice" position on anarchism is thoroughly traditional. The proposition that security is essential for social order is combined with the usually *implicit assumption* that it is a single, indivisible lump, i.e., that since security is a "nonexcludable" good, in order for it to be supplied to any one individual it must be supplied to the entire population, and supplied in the same quantity and quality. The rational individual will therefore reason that he will maximize his utility

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by "free riding," i.e., by not paying. He will then be able to receive the good at zero cost to himself. The problem, of course, is that if others think likewise and decide to free ride (which they will since they are by definition rational), no one will pay and thus the very good, security, which all presumably value can be supplied to no one. Since security cannot be supplied spontaneously through the voluntary activities of individuals, the solution necessitates a nonvoluntary institution, i.e., a government, to eliminate the incentive to free ride by coercing, i.e., taxing, all the consumers of the good to insure that everyone pay his fair share (see the definitions and descriptions of anarchy and government in, for example, Bush, especially pp. 6 and 14–15; Gunning, pp. 19 and 25; Hogarty, p. 53; Tullock, 1972a, pp. 65–75; Pingry, pp. 60–61; Tullock, 1974a, pp. 65–70; Tullock, 1976, pp. 8–13; Buchanan, 1975, pp. 35–73; Auster and Silver, pp. 56–57).

The critical question is whether or not security is, in fact, an indivisible lump, as is traditionally assumed by political theorists in general and public choice analysts in particular, or whether it is capable of being broken down into marginal units and either sold on the free market or provided in some other nonmonopolistic, noncoercive way.

1. The Rule of Law

Probably the single most persistent criticism of anarchism is the assumption that where there is no government there is no law. This view of anarchism as *inherently* lawless permeates public choice analysis. Both Buchanan (1972, p. 29) and Tullock (1972a, pp. 65–75) refer to anarchism as "the Hobbesian jungle." According to Tullock there can be "no serious reason for trading" in an anarchy since "the stronger can seize anything he wishes" (1972a, p. 65). And Winston Bush (p. 14) comments that "rules concerning property rights are better than anarchy," clearly implying that anarchism is incompatible with such essential components of security as rights and law.

This view is, of course, not limited to public choice theorists. It pervades nearly all the critical literature, professional as well as popular, on the subject. Richard Taylor (p. 138), for example, maintains that anarchism is contradictory because while the goal of anarchism is individual freedom, "freedom is possible only within a legal order or, which is the same thing, only within a vastly powerful state." Peter Crosby (pp. 382–83) says that "since the anarchist eschews all talk of law; constitutional, statutory or even common," there would be "no way to legally guarantee anything." John Hospers (1971, pp. 425–27) points out that "law is a necessity for any form of social organization," and then adds that "since there is no government, there is no law." The result, he believes, would be chaos and civil war resulting, eventually, not in freedom but rather in the tyranny of the strong. Similar quotations could be provided almost indefinitely.

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These criticisms would indeed be devastating were it not that, rather than an opposition to law, one finds in anarchist literature continual references to "natural law," "objective law," "common law," the "libertarian law code," "enforcible custom," etc. It is clear from any careful reading of anarchist literature that what anarchists oppose is not law but *legislation.* Not only do anarchists recognize the crucial importance of the rule of law, but persistently argue that it is government legislation, with its ability to change old laws and to create new laws on the spot, that generates precisely that legal uncertainty that violates a true rule of law (see, for example, Rothbard, 1962; Perkins and Perkins; Tannehill and Tannehill; Kropotkin; Friedman).

The critical issue then changes: is it possible to have law in the absence of legislation? Since anarchists in general usually advocate some sort of common-law approach, a brief digression on the evolution and process of the common law is necessary to make what may be termed the anarchist solution to the security issue understandable.

It is significant that many scholars who do not question the need for government have pointed out that law as a product of legislation is a very recent phenomenon. F. A. Hayek (p. 72) remarks that while "law in the sense of enforced rules of conduct is undoubtedly coeval with society," the "invention of legislation came relatively late in the history of mankind." Bertrand de Jouvenal notes (pp. 209–11) that "the power to legislate" was not a power wrested by the people from the king but was a completely novel phenomenon that appeared only when popular sovereignty supplanted the concept of divine sovereignty during the seventeenth and eighteenth centuries. Norman Cantor (pp. 171–72, 234) admits that the English common law "had no concept of either legislation or royal authority to make law by the king's will." And, he adds, "not until the seventeenth century is the idea that legislation is the manufacturing of new law clearly formulated and grasped." And Frederic J. Stimson states (pp. 2–4) very clearly that

> The "law" of the Anglo-Saxon people was regarded as a thing existing by itself. . . . It was 500 years before the notion crept into the minds, even of the members of the British Parliaments, that they could make a *new* law. What they supposed they did, and what they were understood to do, was merely to *declare* the law, as it was then and as it had been from time immemorial.

"The notion of law as a statute, a thing passed by a legislature, a thing enacted, made new by a representative assembly," he continues, "is perfectly modern, and yet has so thoroughly taken possession of our minds . . . that statutes have assumed in our minds the main bulk of the concept of law as we formulate it to ourselves."

But if law need not be a command from above, i.e., either enacted by a legislature or imposed by a king, how did it emerge and, more importantly, acquire

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validity for society? Both F. A. Hayek (p. 83) and Bruno Leoni (p. 85) argue that both classical Roman civil law and English common law were, in Hayek's words, "almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation." The Roman jurist," says Leoni,

> was a sort of scientist: the objectives of his research were the solutions to cases that citizens submitted to him for study, just as industrialists might today submit to a physicist or to an engineer a technical problem concerning their plants or their production. Hence, private Roman law was something to be described or discovered, not something to be enacted.

While this no doubt took place, its extent is still a matter of some dispute (see, for example, Plucknett, pp. 316–17, and Jolowicz, p. 20), and it is possible that Leoni, in particular, exaggerates the importance of judicial law-making by Roman jurists and, accordingly, underrates the importance of legislation.

Whatever the relation between custom and legislation in ancient Roman law, however, there can be little doubt as to the relatively greater significance of custom in the English common law. This is not to say that legislation was totally absent. However, as Carter and Herz point out (p. 173),

> if all legislation in England and the United States were suddenly declared null and void there would still be a body of common law and equity on which to depend. . . .If, on the other hand, common law and equity were swept away, the basic foundation in both countries for the rules governing such matters as contracts, wills, trespass, or libel would be missing, except insofar as the rules in these fields have been embodied in legislation.

Although the origins of the common law can be traced to pre-Norman England, its significant beginnings date from around the twelfth century, when individuals schooled in the law began to follow a regular route—hence becoming known as circuit judges—traveling from town to town, holding court as they went. Individuals would submit disputes to these judges, and it was from the growing corpus of these *individual* judicial decisions that a body of law, common for the whole realm, gradually emerged.

The single most important element in the common law is the principle of precedent, or *stare decisis*, in which past judicial decisions became the basis for future ones. "In a codified system of law," says Rene Wormser (pp. 237–64), "a judge may interpret the language of the written law as he wishes, regardless of precedent. This is not true of the English system, which is governed by the rule of *stare decisis*, 'to stand by decided cases.'" This meant that when a dispute was submitted to a common law judge, his duty was solely *to clarify the existing law.* This has obvious ramifications for a rule of law. Since a judge's decision was immediately binding only on the parties to a dispute, and since a single maverick decision would have little impact on the body of the law, the judge was helpless to change the law. Thus the importance of *stare decisis* was that it gave stability

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and certainty to the law, i.e., it made possible a *true* rule of law. Such, briefly, is the common-law approach.

Quite clearly, then, the common criticism of anarchism as inherently lawless is not only based on the nonsequitur that where there is no government there is no law, it is also historically false. Law has existed from the earliest of times; legislation only recently. However, references to historical periods when judge-made law was the dominant form of law making are not enough to establish that such an approach is still applicable today or that it can be the sole method of law making.

There is one possible criticism of the common-law approach, made even by those like Hayek who are otherwise sympathetic to it, that challenges the sufficiency of the common law as the sole method of law making. According to this criticism, the very inability of the judge to alter the law is not only the strength but also the weakness of the common law. The gradual development inherent in common law, says Hayek (pp. 88–89) "may prove to be too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances." Consequently, he concludes, although the overwhelming bulk of the law ought to be spontaneously emerging and evolving common law, one cannot dispense with positive legislation entirely. Legislation is required to remedy the occasional shortcomings of the common law.

This criticism is questioned by numerous nonanarchist authorities on the common law. Wormser acknowledges (p. 261) that *theoretically* the principle of *stare decisis* should make the common law static and thus changeable only by legislation. But, he continues, *in actuality* "the common law has been able to grow without constant interference by legislation because judges have been able in various ways to circumvent disagreeable or obstructive precedents." And Plucknett (pp. 306–14) observes that in many cases the facts are such that the real question is which of several possible precedents or customs, or combinations of them, to use. Judges thus have some latitude in adapting the law to new and changing circumstances and guiding it away from clearly outmoded precedents.

Another important mechanism for circumvention has been noted by James B. Scott and Sir Henry Maine. It "grew out of the practice," says Scott (pp. 107–24) in ancient Roman law of speaking of the *jus gentium,* and was "molded and interpreted in response to the needs of daily life." But occasionally conditions changed or situations arose for which no law existed. It was here, he says, that "theory came to the aid of practice." The jurisconsults looked for legal or philosophical principles compatible with the common law. These principles were then used as guides for applying the common law in new cases as well as for providing new interpretations of existing law where novel situations made such law outmoded or undesirable. The jurisconsults found the natural law aspects of the Greek doctrine of stoicism useful here, and it was thus that the common law

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became closely associated with natural law. Maine (in Wormser, pp. 261–62) makes the nearly identical point regarding the English common law.

Clearly an anarchist legal system might be able to respond to unforseen issues in a similar way. One example, pollution control, will suffice to illustrate the process. The important point is not that the common law did not recognize ownership rights to air space but that until recently clean air was so plentiful that the issue of ownership rights to it never really arose. But as pollution became a problem, clean air became a relatively scarce and, hence, an economically valued good. Thus a judicial decision declaring pollutants to be a violation of property rights would constitute not so much the creation of new law as simply the extension of the existing law regarding trespassing into a new area, i.e., air space. It is also important to realize that since the decision of a common-law judge is binding only on the immediate parties to a dispute, he has no power to impose his decisions on "society." Whether or not such a legal opinion would become part of the body of law would thus depend on both the state of public opinion and the views of other judges. In this case, too, reference to the routine process by which the common law traditionally handled such problems is relevant here. Doubts created by gaps in the law, Wormser (p. 262) points out, were dispelled when "a further case decides the point about which the earlier judge speculated. And if the judge who uttered the *dictum* was well respected, other judges after him might continue to follow it." I see no reason why a similar approach could not work today. If so, it would be feasible to extend the common law into such novel areas as, say, pollution control, video recorder pirating, and the use of personal computers to "invade" personal privacy.

This raises an additional question: Could the evolution of the law take place with the rapidity required to cope successfully with changed circumstances? History, again, provides the answer. Plucknett, for example, argues (p. 307) that "the remarkable feature of custom was its flexibility and adaptability." "In modern times," he says, "we hear a lot too much of the phrase 'immemorial custom.' Insofar as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate." In fact, he says, a custom was considered old if it had been in existence for ten to twenty years, very old if it dated from about thirty years, and ancient if it had been around as long as forty years. In short, there appears to be no reason why the pure common law could not successfully deal with even rapidly changing situations.

In summary, one can say that since legislated law is consciously *created* for the entire society by a single group of individuals, it can change quite rapidly. In contrast, while the common law does *evolve*, it cannot change nearly as rapidly as legislated law. But this limitation is not necessarily bad; it also means that because no one individual or group can repeal existing law or create completely new law, the *continuity* of the law is maintained, thereby giving individuals the security of knowing what the law is day in and day out. That is, while there may

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be greater transitional or *short run uncertainty* associated with the common law, there is also far greater *long run stability.*

This historical excursus was meant to show not only that it is possible to have law in the absence of legislation but that that was, in fact, the norm. Law can be traced back to the very origins of society, while in terms of recorded history legislation made its appearance only recently.

Up to this point I have dealt only with the *process* by which law could emerge in an anarchist society. But a question of equal importance deals with the *content* of the law. While it might be thought that the content of judge-made or spontaneously emerging law could run the gamut from libertarian to authoritarian, depending on the "sense of the community," a closer analysis indicates, I believe, that it was no accident that the common law was largely libertarian. The distinguishing characteristic of judge-made law is that the judge is called in only to settle disputes arising between two parties, and his decision is binding only on the parties concerned. But since disputes can arise only when one individual feels his rights have been violated, the cases that the judge will be asked to decide will be limited to those concerned with the scope of individual rights. *The process by which the common law emerges therefore determines, to a large extent, its content.* The effect of the body of judicial decisions designed to ascertain when one individual is aggressing against another must result in a body of law defining the protected domains of each and every individual. How large or small the protected domains will be will, of course, be affected by the way such terms as "aggression" and "rights" are defined. And since, as we have seen, judicial decisions that departed widely from popular expectations of what the law ought to be tended to be ignored by other judges, the definitions of these terms were influenced by the views predominating in the community. This means, of course, that while the content of the common law could never depart widely or for long from the views dominant in the community, it must still be stressed that the process by which common-law decisions are made must produce a body of law establishing the protected domains for individual activity. In short, *the common law probably moves the community in a libertarian direction.*

2. The Courts

Even granting that there can be law without legislation, would it be possible for a judicial system to operate in the absence of a government?

The popular view of law, derived from the mechanistic and power-grounded philosophies of Jean Bodin, Thomas Hobbes, and John Austin (and James Buchanan, Gordon Tullock, et al.?), sees it as the command of the "sovereign" to the subjects. But this exaggerates both the extent and effectiveness of power. Law, as the noted legal philosopher Lon Fuller notes (p. 209), does not operate in a social vacuum. Law is not so much vertical, i.e., the command from the

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sovereign, as horizontal, in that *any* functioning legal order is dependent on the "existence of a relatively stable reciprocity of expectations between lawgiver and subject." Much the same thing has been noted by Hayek (p. 35):

> It would . . . probably be nearer the truth if we inverted that plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that law appoints authority but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.

Thus while laws will tend to be obeyed as long as they are seen as worthy of obedience, i.e., as legitimate, the decisions of the legal order will generally not be felt as binding if they are continually at variance with popular notions about what is right. It is probably true to a point seldom realized that *no* social system—of which the legal order is a major component—can long endure without the at least passive support of a large majority. It is only when such support exists that the legal order can focus its attentions on the recalcitrant activities of the socially disruptive minority.

What, specifically, would be the process by which laws would be judged and enforced in an anarchy? In the absence of government there would be no tax-supported and coercively imposed "protection service." No one would have to purchase protection if he did not desire it. Yet, law is obviously a good highly valued by most, if not all, of us. In the wake of the abolition of the government monopoly in this area it is likely that, just as in other industries, companies would quickly form to supply defense or protection services to those who want them. This would no doubt entail some initial uncertainty as companies offered a variety of legal codes and "protection packages" to consumers, although much would depend on the nature of the transition, i.e., radical abolition or a gradual phase-out, phase-in process. Nevertheless, there are definite factors that would facilitate the rather quick emergence of a rule of law, even in such "morally underdetermined areas," to use Robert Nozick's term, as legal procedures. First of all, there is what may be termed "economies of standardization." A plethora of conflicting legal codes would make the provision of defense services both needlessly inefficient and prohibitively expensive. In order for any protection agency or judicial entrepreneur to offer reliable service, it would be necessary to enter into an extensive and thus very expensive series of negotiations with all other companies or entrepreneurs offering different packages. Only in this way could it be decided which provision of which particular code would take precedence in the event of a dispute between its client and the client of an agency offering a substantially different package. As a result, argues John Sneed (pp. 121–22),

> there would be . . . a tendency for codes to standardize, especially in minor detail, due to considerations of transaction costs and the cost of maintaining a stock of knowledge of other codes. Difference in codes would persist only

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> in those areas where demand for non-enforcement over-rides the economies of standardization. These areas would consist largely of enforcement demands based upon moral and religious convictions, which, while not irrational, can be classed as non-rational and not subject to profit-maximization behavioral assumptions. Thus, a substantial move toward standardization would occur in the treatment of crimes of violence and infractions of commercial codes, while diversity would persist in the demand for mores-enforcement.

The uncertainty of the transition would be minimized by a second factor. With the abolition of government the "public arena" will have ceased to exist, and all property would be privately owned. It follows, therefore, that that part of the law dealing with the public arena would become irrelevant, leaving only those laws pertaining to the use and abuse of private property. As a result of these two factors, not only would a rule of law quickly emerge, but it would emerge with a generally libertarian content. Would this mean that everyone, even nonlibertarians, would be forced to live an unrestrained lifestyle?

The answer is clearly no. Since it is likely that the basic tenet of the anarchist legal code, as it emerged from the common-law process, would be the injunction against the *initiation* of the use of force, it would permit the emergence of a complex set of voluntary contractual relations, or "bilateral laws." Such laws would be created on the spot by the individuals concerned. They would be designed to deal with a particular problem and would be binding only on those voluntarily binding themselves to them. And they would automatically lose their validity as soon as the conditions they were designed to deal with no longer held. An example will make this clear. A landlord with an acute aversion to noise might decide to rent only to those who agree that they will not listen to radio, television, or stereo and be quietly in bed by eight o'clock every night. While he would be completely within his right to set such stipulations on the use of his property, it is probable that such a landlord would find very few tenants. If he were to relax his restrictions to attract additional tenants, he would be deciding that more tenants and fewer restrictions is better than fewer tenants and more restrictions. Similarly, the tenants would be deciding that the contract offered them by the landlord is a better package than any other with which they are familiar. In this way the anarchist legal code would provide for the working out by means of voluntary contracts a complex and highly flexible set of arrangements that can not only be tailored to fit each particular situation but, since it requires the *voluntary* commitment of each and every individual concerned, must be to the *benefit of all parties.*

It takes little imagination to envision just a few of the possibilities that such an anarchist legal order would permit. For example, those who find capitalism distasteful could pool their property and establish socialist or collectivist communities. In fact, there is no reason why such communities could not stipulate such things as, say, minimum wages or even tariffs for their communities. Other proprietary communities might establish rules prohibiting the use of drugs or

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permitting prostitution. So long as these commitments were made voluntarily, i.e., those who disliked the rules could get out, such activities would be consistent with the common law or the anarchist legal code. That is, since the fundamental tenet of the anarchist legal code would be voluntarism, *it is compatible with numerous economic and social lifestyles.*

The foregoing enables us to clarify the role of consent in the legal process. The primary purpose of law is to regulate human behavior in such a way as to allow for the emergence of a social order in which individuals are able to interact. But a fairly common view is that in an anarchy *every* individual would have to give his consent to *every* law. This, of course, would mean that the only laws any individual would then be required to obey would be those he had consented to, thereby rendering an anarchy "lawless." This view is based on a confusion about the role of consent. For any individual to give his consent he must be autonomous, i.e., free to give his consent. This freedom presupposes a *framework binding on all individuals* prohibiting anyone from interfering with the autonomous domains of others, i.e., from initiating violence. Clearly, if the area of consent, i.e., bilateral and contractual laws, is to operate effectively, the moral and legal framework within which it operates cannot itself be based on consent. Thus, the natural law qua common law provides the fundamental legal framework within which those laws based on actual individual consent operate.

Thus far I have dealt with how a generally libertarian rule of law would be likely to emerge in an anarchist society and with how that rule of law would provide the framework for a much more complicated and flexible system of contractual laws. Earlier, reference was made to the possibility that judicial services might be supplied privately, on a competitive basis. How, specifically, would such a system be likely to operate?

First, if a dispute were settled to the mutual agreement of the parties involved there would be no problem. This is often the case, for example, when an accident victim and the other party or his insurance company agree on a settlement. Second, the two parties unable to reach an agreement may decide to submit their dispute to an arbitrator. This, too, is a mechanism used today to an extent seldom realized. Insurance companies regularly settle hundreds of thousands of claims each year. As of 1987 the American Arbitration Association alone had in excess of 60,000 members empanelled as arbitrators or mediators. "Add to this the unknown number of individuals who arbitrate disputes within particular industries or particular localities, without AAA affiliation," writes William Wooldridge (p. 101), and "the quantitatively secondary role of official courts begins to be apparent."

Third, there would be no problem in cases where both parties subscribed in advance to the same court company or arbitration agency. Since both parties had already contractually agreed to abide by the court's decision, that decision would be binding.

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But what if the parties subscribed to different agencies? There would be no difficulty if both courts arrived at the same decision. This is probably not as unlikely as it might seem at first, since no court company could stay in business by rendering biased decisions in order to protect the illicit activities of its clientele. If the Smith Court Company acquired a reputation for protecting criminals, it would then begin to attract criminals as clients. But who would be willing to sign a contract with a criminal-client of the Smith Company agreeing that in the event of a dispute between two individuals, it would be taken to the Smith Company? Since both the Smith Company and its clients would be suspect, any rational nonclient would be willing to do business with a Smith Company client only if the latter signed a contract agreeing to take any dispute to an independent company. Consequently, the only disputes that would be submitted to the Smith company would be those between its own clients. If it then rendered decisions unjustly favoring one of its clients over the other, it would alienate a part of its own clientele. In fact, since both parties would expect the Smith Company to decide in their favors (that, after all is what they paid for), the Smith Company would alienate its clients *regardless* of which way it decided. In this way, *self-interest* alone would compel the Smith Company to render just decisions or go out of business.

It is important to realize that this position is not predicated on the naive belief that all, or even most men, are good or desire justice. It is based, rather, on the simple but realistic proposition that no one desires to be swindled. A might wish to sign a contract to buy a piece of land from B, a transaction that would include an agreement to take any future dispute concerning the land to an agency A knew would favor him. B would desire to have any dispute taken to a company that would favor him. Since, obviously, neither would agree to the other's terms, the transaction could be consummated only if both agreed to submit any dispute to a neutral agency. This means that the greater a judge's reputation for honesty, the more cases he will have submitted to him. And, of course, the more cases submitted to him, the more money he will earn. "What keeps A&P honest," argues anarchist theoretician Murray Rothbard (1973, pp. 245–46),

> is the competition, actual and potential, of Safeway, Pioneer, and countless other grocery stores. What keeps them honest is the ability of consumers to cut off their patronage. What would keep the free-market judges and courts honest is the lively possibility of heading down the road to *another* judge or court if suspicion should descend upon any particular one. . . . These are the *real,* active checks and balances of the free-market economy and the free society.

Consequently, he concludes, in an anarchy "any suspicion of a judge or court will cause their customers to melt away and their 'decisions' to be ignored. This is a far more efficient system of keeping judges honest than the mechanism of government."

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But what would happen when agencies *did* arrive at different decisions? If one grants such companies even a modicum of common sense and foresight, it seems probable that to protect themselves and their customers from attempts by con men and other unscrupulous people to play off one court against another for their own benefit, the various courts in an area, as part of their policies, would have worked out agreements with one another *in advance* specifying to which appeals court a legal proceeding involving two different agencies would be taken. Prudential and Metropolitan Court Companies, for example, may decide in advance to take all differences between them to Acme Appeals Court Company. But Prudential and Zenith Companies might agree to take such cases to Queen City Appeals Court Agency. In this way the choice of appeals courts would be a routine matter. The contract would no doubt also stipulate that the decisions of the appeals court would be binding.

Finally, what of a dispute in which one or both parties did not have prior contractual agreements, and one of the parties refused to submit the case to arbitration? In the first place, this would probably be unlikely since the reputation of the recalcitrant individual would suffer from such refusal, causing others to be quite hesitant to have any business dealings with him. Nevertheless, there is no reason why the judicial process could not proceed despite the refusal. If, say, Abbott brought charges in the Prudential Court Company against Costello, Costello could *either* attend the trial at the Prudential Agency *or* go to his own agency, say Metropolitan. But if Costello refused to do either, then the findings of the Prudential Court would be considered binding. If the Prudential Agency found Costello innocent, the matter would end at that point. But if Prudential found him guilty, then Costello could either accept the decision, in effect pleading *nolo contendere,* or contest it by submitting the matter to Metropolitan. Of course, if Metropolitan also found Costello guilty, then that would be the end of the matter. But if Metropolitan found Costello innocent then the dispute would, as a matter of course, be submitted to the previously agreed on appeals court company, in this case the Acme Appeals Court Company (See, for example, Rothbard, 1978, pp. 191–207, and Osterfeld, pp. 336–48).

What if the courts do not have a prior agreement and cannot agree on an appeals court? This, too, would be an unlikely occurrence since there is a clear monetary incentive for the courts to reach an agreement. Their customers, after all, are paying them to decide the issue, and if they were regularly unable to decide they would begin to lose their clients. Moreover, if, say, the Maverick Court Company acquired a reputation for delaying and disrupting the proceedings, other court agencies could simply announce to *their* customers that they will no longer handle disputes involving clients of Maverick, a decision that would make individuals hesitant to have any dealings with Maverick clients. Since this would cause Maverick's clients to use other court agencies, Maverick would be compelled either to mend its ways or to go bankrupt.

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At this point it might be well to summarize the legal process as it would be likely to emerge in an anarchy:

[1] If two parties belong to the same court company, the decision of that company would be binding.

[2] If they have no contractual agreement but can agree on which court company to submit the dispute to, the decision of that court would be binding.

[3] If they subscribe to separate courts, the decision is binding if the courts agree. If they disagree, they will submit the dispute to an appeals court, which usually will have been chosen in advance, and that decision would be binding. If there is no prior agreement and the courts cannot decide on which appeals court to take the issue to, then the individual parties could work out on agreement on their own. If this, too, cannot be done, then no decision could be made. This would be extremely rare, for if a company regularly engaged in protracted and costly legal proceedings, other courts would refuse to do business with it, causing it to lose many or most of its customers, and thereby risking bankruptcy.

[4] If one individual refuses to submit a dispute for arbitration, the other party may go ahead and submit it to his company, and the decision of that company would be binding unless the reluctant party then submits his case to another court agency. The decision would be binding if the two courts agree. If they disagree, the case would then be submitted to an appeals court as described in [3].

4. Police Protection

Assuming that human nature in an anarchy would be no different than in a society with government, violent crimes such as murder and rape would still occur. Hence the need for police protection—defined here as the use of *retaliatory* force against individuals *initiating*, or attempting to initiate, the use of force against others—would remain. How might such protection be provided without government?

Since such protection would be highly desirable, it seems reasonable to suppose that defense agencies or police companies would form to provide protection services to consumers on a contractual basis. While there are numerous ways this might be done, the most likely is for such services to be "sold on an advance subscription basis, with premiums paid regularly and service to be supplied on call" (Rothbard, 1971, p. 4). The various police companies could offer their services on the market. Any individual could either provide for his own defense or purchase the services of one of the competing companies. Just as with any other good or service, the market would provide an abundance of protection policies offered at different rates and designed to meet a host of different consumer needs so that those who wanted bodyguards twenty-four hours a day could hire them, while those who merely desired an occasional nightly check of their property could get that too. No one would be forced, i.e., taxed, to pay for protection he did not want, and everyone would be free to purchase the quantity

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and quality of protection services he desired, including none at all. It is precisely the competition between defense agencies, competition that by definition is absent when protection is supplied by the government, that would ensure that protection in an anarchy would be both better and less expensive than that obtained through government.

Several arguments can be, and have been, advanced against the idea of competing police agencies. An examination of these will help to clarify several important aspects in the proposal to provide police services on the market. These arguments are as follows:

1. The argument that either a "minimal state" or a Mafia-like agency would emerge through economic competition.
2. The argument that a Mafia-like agency would emerge through aggression.
3. The argument that selling protection services on the market would generate insecurity.

Each of these will be examined in turn.

1. The Competition Argument. Philosopher Robert Nozick (pp. 3–146) argues that because of the nature of the services being offered, a system of competing police protection agencies would give way to single "dominant protection agencies," or DPAs, operating in geographically distinct regions. According to Nozick, the effectiveness of any agency's protection would vary positively with the size of the agency. Thus, as one agency began to prosper, individuals would begin to shift their patronage to that agency. As the income of the competing agencies then fell, the scope and quality of their protection services would likewise decline. The competing agencies, he says, get "caught in a declining spiral," and the result is the emergence of a DPA. Since Nozick believes that the DPA *should* proceed to provide protection to everyone in its geographical area, it would then become a minimal, or "nightwatchman," state.

But philosopher John Hospers argues that the agency could also use its dominant position to *victimize* rather than protect "its" clients. "Perhaps the most important assumption of all," he says (1973, p. 21),

> is that there would continue to be a group of defense agencies (and courts) which *would remain competitive.* This is indeed one way in which the scenario could be written. But there are other ways. Suppose that one agency became so superbly efficient . . . that it became larger than any of the other agencies and . . . had, say, 99 percent of the business for a thousand miles around. . . . We would then have a defense agency grown so swollen with success that it could do just what it liked: it could turn into a criminal gang. . . . This would be in fact, if not in name, a military takeover. And the result would be . . . an aggressive bandit government.

A serious problem with the Nozick-Hospers line of argument is that they envision a number of dominant agencies whose areas of operation are geographically

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distinct. But if the advantages of being a client of the dominant agency are so irresistable, and if, as Nozick says, "economies of scale" are positively correlated with increasing size, then, by the logic of Nozick's own argument, the protection agency of optimal size would be *the entire world.* Apparently, notes Lawrence Moss (p. 21),

> something imposes a limit on the expansion of a single protection agency in a given geographical area. If, for example, the marginal cost of adding individuals to the protection agency rises, there may come a point, with rising average cost, at which the marginal sacrifice of private goods as perceived by the choice-making individual is greater than the marginal gain in security. At this point . . . the optimal size for the protection agency has been achieved.

In the United States today there are approximately 40,000 police forces, ranging in size from one man to 30,000 men. Even if the optimal economic size of a protection agency were such that the market would not support 40,000 agencies, there is simply no reason to suppose, short of making the unrealistic assumption that average cost will steadily decline as the size of the agency increases, that this will lead to a dominant agency.

This argument is supported by the available empirical evidence. According to conventional wisdom, the consolidation of many of the 40,000 departments would permit much more efficient and effective police service. This wisdom was placed in considerable doubt when several recent studies, such as those done in Indianapolis, Indiana; Grand Rapids, Michigan; St. Louis, Missouri; and Nashville-Davidson County, Tennessee, all indicated that relatively small police forces were not only more efficient but also more economical (see, for example, Ostrom, p. 15).

But if large jurisdictions are economically and socially irrational, they would not be supported on the market. And if that is the case, the scenario depicted in the Nozick-Hospers critique could not occur. Not only is there no *economic* reason to expect the emergence of a DPA, it is possible that the optimal size of a defense agency would be such that the number of agencies might exceed 40,000.

2. *The Aggression Argument.* A second argument against competing police agencies is that nothing would prevent an agency from using force to conquer or absorb weaker agencies until it attained a position of unchallenged dominance, which it could then use to exploit its clients. The Mafia-like agency would achieve its dominance through aggression rather than economic competition. While not specifically directed at anarchism, this is the criticism raised by George Berkley and Douglas Fox against any decentralized political system (pp. 25–26). Germany's Weimar Republic, they point out, rested on a federal base. Most German states outlawed the Nazi Party, but Bavaria did not. "This gave the Nazis a sectional base on which to build. Then, when they did become a nationwide movement, they found that the individual governments of the states . . . were each too weak to curb their frequently unruly and unlawful tactics. There were thirty-

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three police forces in Germany at the time and the Nazi Party soon became stronger than any one of them." In contrast, the French government was centralized and acted with vigor. With a single police force for the entire country, it was able to take decisive action against the attempted fascist and Communist takeovers of 1934.

This is an interesting criticism. However, if one starts from the plausible assumption that while nearly everyone values protection and security and only some will desire aggression against others, then those companies most adept at providing protection and security will get the vast bulk of the business. The moment any agency turned from attracting customers by providing protection services to coercing individuals into buying its policies, it would simply "compel them to buy protection from its competitors and drive itself out of business" (Tannehill and Tannehill, p. 81). If an agency initiated violence against individuals who were not its customers, it would be forced to deal with their defense agencies. Since other agencies are paid to protect their customers while the aggressive organization is paid to terrorize others, the latter would find itself in direct confrontation with all other agencies. Working for the criminal agency would thus become increasingly risky, and the agency would have to pay its employees high salaries to compensate them for the risk. Aggression would become less and less profitable and thus less attractive because the higher costs to the aggressor company would compel it to raise its premiums. The victims of theft, argues the anarchist David Friedman (p. 167),

> will be willing to pay more to be protected than the thieves will pay to be able to steal (since stolen goods are worth less to the thief than the victim). Therefore the noncriminal protection agencies will find it profitable to spend more to defeat them. In effect, the criminals fight a hopeless war with the rest of society.

Further, since the defense agencies are paid to protect their clients from aggression, they would have no reason to cooperate with the criminal agency. Even if the criminal agency had its own court, it is unlikely that its decisions would be heeded, for any other court honoring the decisions would, out of its clients' own interests, begin to lose its own customers. Finally, since insurance companies indemnify their policy-holders against the destruction and theft of their property, they would have a vested interest in seeing that such aggression were held to a minimum. It is logical to suppose that insurance companies would stipulate that their customers install burglar alarms or other security devices and have them connected to their defense agency's office. They might also insist that a client purchase his protection services from certain police companies in order, as the Tannnehills put it (pp. 85–86), "to avoid having him hire an inefficient or fly-by-night defense agency at a cheap price while counting on his insurance to make up for any loss which their ineffectiveness caused him." Thus, they continue,

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> Insurance companies, *without any resort to physical force,* could be a very effective factor in bringing an unruly defense agency to its knees via boycott and business ostracism. . . . It would be difficult, indeed, for any defense company to survive if the major insurance companies refused to sell insurance not only to it, but to anyone who dealt with it. Such a boycott would dry up a major part of it the defense company's market in short order; and no business can survive for long without customers. There would be no way for a defense agency to break such a boycott by the use of force. Any threatening or aggressive actions toward the insurance companies involved would spread the boycott as other businesses and individuals attempted to stay as far away from the coercive agency as possible.

The possibility of collusion among several agencies would not alter the situation. We have seen that there are good reasons, both empirical and analytical, to believe that there would be numerous agencies operating in the protection field. Thus, if even a Mafia cartel were formed, the presence of independent agencies would bring about its quick collapse for the reasons already discussed.

In fact, the aggression argument is actually more applicable to governments than anarchies. An anarchy would be characterized by multiple centers of power. But the state, with its monopoly on the use of force, is characterized by a single power center. Since it would be much easier to take over a single center of power than multiple centers, the fear that a tyrant might take over is actually a compelling argument *against* government and *for* anarchism.

In short, the prospect of being victimized by a Mafia agency or even a Mafia cartel is remote. Moreover, given the increased efficiency of police companies in an anarchy, it is logical to suppose that crime would no longer, or less often, pay, in which case the crime rate in an anarchy would be well below that in a statist society.

Anarchism, however, is not a panacea. The *possibility* of a Mafia-like agency cannot be entirely dismissed. But this possibility must be placed in perspective. Just as there could be criminal agencies in an anarchy, so there could be and, as the widespread police and government corruption clearly shows, there are state and city police departments that can only be termed criminal. It is significant that since citizens have no alternative to these police departments in a statist society, there are no or only weak checks on police corruption and victimization. Consequently, one would expect to find less police corruption in a system in which police services were offered on a private basis and individuals could take their business elsewhere than in a system in which such competition is absent.

The empirical evidence on this issue is, of course, minimal. However, the Protection Section of the American Railway Association was close to being a purely private police agency. The section was studied by Jeremiah Shallou in the 1930s, when it constituted a force of over 10,000 men. The record compiled by the railway police, or "private armies" as Shallou calls them, was incredible. Between 1919, when they were organized, and 1929, when Shallou's study was begun, they

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succeeded in reducing freight claim payments for robberies from $12,726,947 to $704,267 per year, or by 97.7%. And their percent of arrests turning into convictions was likewise phenomenal: regularly over 80%. But what particularly impressed Shallou was the comportment of the agents. "The fact that so few complaints have been directed against them," he says (in Wooldridge, pp. 116–17), "is eloquent of the efficiency with which they are controlled by the railroads. In Pennsylvania the state exercises no control whatever over these police. . . . Railroad police are responsible to the company by which they are employed and no one else."

In short, criminal agencies *might* exist in an anarchy. But one must not forget that they *do* exist in today's statist society. The real question is which system is more likely to result in a greater amount of criminal activity, private and public? A competitive system works automatically to minimize the incidence of corruption and criminality by both citizens and the police. It seems likely that it would also work to minimize the possibility of would-be dictators, of budding Hitlers, from gaining the "Bavarian base" they need to launch their takeovers. The aggression argument is therefore not particularly convincing.

3. The Insecurity Argument. In addition to his argument that competition in defense services would lead to the emergence of a DPA, Nozick contends that the knowledge that one is living is a society permitting individuals to engage in acts of "private justice" would produce public insecurity. The solution, he says, would be for the protection agency to forbid even nonmembers from engaging in such acts against clients of the company provided the independents are *compensated* for "the disadvantages imposed on them by being prohibited self-help enforcement." Compensation would be in the form of "protective services to cover those situations of conflict with the paying customers of the protective agency." Since the DPA could prohibit not only its own clients but nonclients as well from defending themselves provided they receive compensation, the DPA becomes, in effect, a minimal state.

Would an anarchy be a society permeated by insecurity? Assuming the existence of a clear rule of law, and given the overwhelming advantages of specialization, it seems safe to conclude that the vast majority of individuals would hire police agencies to act on their behalf. Consequently, acts of "private justice" would be few and far between and, when performed, it seems likely that they would be done with a fair degree of care. If so, the possibility that such acts could occur would generate very little insecurity. After all, if any individual or employee of a defense agency did

> negligently or aggressively apprehend individuals, the improperly detained individual may charge the defense agent employee with aggression and negligence. The mistakes by defense agents will be covered by the insuring bonding company. Under these conditions, a defense company will not retain an employee making an unreasonable number of mistakes, because the cost

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> of insuring such personnel would soon become prohibitive for them. There is thus an automatic protection against "police" brutality, which cannot occur in a legal [statist] society (Perkins and Perkins, p. 101).

Two final points should be made in this context. First, anarchism does not necessarily mean that every individual need provide for his own defense at all times. It is possible that landlords would supply their tenants with police protection as part of the rental agreement. Insurance companies, anxious to keep down the crime rate, might provide protection to their subscribers as part of their policies. And owners of various business complexes such as shopping centers or downtown areas would have to maintain safe and pleasant surroundings in order to attract customers. Numerous other scenarios are possible.

Second, what of the individual who is too poor to purchase protection? Would he or she be condemned to go without protection? This, it must be acknowledged, is a possibility, and although such a possibility must be lamented, it must also be placed in perspective. Such a situation is hardly unique to an anarchy. It is fairly obvious that there are *no* governments that *in fact* (as opposed to theory) parcel out protection equally. Some individuals and groups receive special attention; others receive very little. Few would contend that American blacks or Russian Jews receive adequate or equal protection from their governments. Moreover, it is precisely in a society where protection services were not monopolized that inadequately protected individuals and groups could actually do something about their predicaments. There would be nothing to prevent poor individuals from getting together to pool their resources to purchase the services of a defense company or to establish their own organization.

In brief, the insecurity argument is no more convincing then the aggression argument. Not only is police protection likely to be better and more convenient in an anarchy but, given the inefficiency of government operations, there is little doubt that it would be far less expensive as well.

5. Conclusion

The public choice theorists maintain that government is necessary in order to insure the provision of public goods. "Security," the most important of all "public goods," has been examined in detail. The basic operating assumption used throughout was that used by the public choice theorists themselves: rational decision making by individuals acting in their own self-interest. The public choice consensus that security is a "nonexcludable good" that can therefore be dispensed only by government, that anarchism would be a "Hobbesian jungle," has been called into question. It was argued that the components of "security," laws, courts, and the police, can all be broken down into marginal units and provided on the free market. If so, then the public choice consensus must be reexamined. Either security is not a collective good, in which case government is not necessary for

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its provision. Or, security is a public good but such goods *do not require government* for their provision. Regardless of how one chooses to view the matter, it is clear that the public choice consensus is badly in need of reconsideration.

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The Philosophy of Freedom

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> Our hope that freedom is not going to be ultimately destroyed by the joint pressure of totalitarianism and the general bureaucratization of the world, and indeed our very readiness to defend it, depends crucially on our belief that the desire for freedom . . . is not an accidental fancy of history, nor a result of peculiar social conditions or a temporary by-product of specific economic life forms . . . but that it is rooted in the very quality of being human.
>
> Leszek Kolakowski (Sometime Professor of Philosophy in the University of Warsaw)

Taking the words "freedom" and "liberty" for present purposes to be sufficiently synonymous, I propose to argue that Kolakowski was right. I shall start by distinguishing between two fundamentally different yet intimately connected senses of these key words. Kolakowski's concern was with what—so long as we do not forget that liberties may be sometimes sustained and sometimes restricted by institutions other than the state—we can conveniently call political freedom. The other sense refers to what is usually dubbed the freedom of the will. My contention is that it must indeed be very difficult, if not practically impossible, to become and to remain committed to the extension of political liberties and the defence of political freedom so long as you refuse to recognize that the freedom of the will "is rooted in the very quality of being human." I shall try to show that it is in fact so rooted and furthermore that no one could contrive to understand the very words in which any denial of this fact has to be expressed without at the same time being in a position to know that that denial must itself be false. In an earlier article I argued that, in order to provide a plausible rationale for the rights claims of the American Declaration of Independence, we have to ground them all upon this same fundamental fact of our human nature.[1]

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1. Political Freedom

In this political understanding, people are correctly described as being free or enjoying liberties inasmuch as and insofar as they are neither confined as prisoners nor constrained by formidable threats. Before proceeding to the freedom of the will, it is worth spending a little time on a few of the commonest confusions, since these are often effectively exploited by the enemies of political freedom.

1. Certainly it would be the diametric opposite of the truth to say of anyone who is "a prisoner and in chains" that he or she is free and at liberty. But it would also be false to say of people who are not in any way prisoners, much less in chains, that they are free or at liberty to do particular things when the doing of those particular things would incur serious penalties, irrespective of whether those penalties would be imposed by law, or nonlegally or even illegally. It is because those who are not prisoners or in chains may still be in many respects unfree, and also because almost everyone is free in at least some respects although in at least some others not free, that it becomes best usually to speak of liberties or of freedoms in the plural, and to begin pedantically to particularize whenever clouds of confusion loom.

Paradoxes arise here because a person or a people may be free from one thing but not another, may here enjoy these liberties but not those. Thus, notoriously, the citizens of countries that have achieved freedom from colonial rule may now enjoy fewer legal liberties than they had under the old regimes; while, equally notoriously, inhabitants of what, because it has yet to be conscripted into "the Socialist Camp," can properly be called the still free world, may nevertheless be subject to other and sometimes comparably burdensome domestic oppressions. Notwithstanding that nowadays such questions seem to be favoured mainly by spokespersons striving to restrict or to devalue existing or expected liberties, it is almost always clarificatory to ask "What freedoms, freedom from what, and freedom for whom?"

2. The eighteenth-century French *philosophe* Helvétius wrote, "The free man is the man who is not in irons nor imprisoned in a jail. . . ." But he added both a third disjunction, "nor terrorized like a slave by the fear of punishment," and a caveat, "it is not lack of freedom not to fly like an eagle or swim like a whale."[2] A century earlier the most formidable of all English political thinkers, Thomas Hobbes, had produced an even terser epitome: "A free man is he that . . . is not hindered to do what he hath the will to do."[3] It is a pity that he apparently failed to notice both that, always supposing that people would in fact intervene to constrain or coerce someone were some particular action to be performed, then that person must remain in that particular respect unfree; and that this is the case regardless of whether or not "he hath the will to do" whatever it may be. A prisoner in jail does not become at liberty to leave just because it so happens that he has no wish to do so. Both the contented and the discontented are, therefore, equally unfree.

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The caveat that Helvétius offers is also important. For I may be free to do many things that it is, for various reasons, not in my power to do. The fact that I am incapable of flying like an eagle or even a butterfly may make my freedom to do these things worthless to me. But, since it does not constitute a ban on my doing them if only I could, this limitation is a limitation on my powers, not on my freedom.

Again we may sympathize with Anatole France scoffing at "the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread".[4] Nevertheless, a liberty that some of us either cannot or do not wish to use is still a liberty. And people reasonably may and in fact often do resent the imposition of restrictions upon actions that they themselves either are unable or do not wish to take. For instance, resentment against the Group Areas Act in South Africa extends far beyond the comparatively small numbers of those who might be able to afford to buy property in areas in which they now are legally forbidden so to do.

Nor should we overlook the possibility that one set of people, the members of which do not themselves propose to take advantage of certain liberties, many nevertheless stand in less direct ways to gain inasmuch as these liberties are also available to other people who will choose to make use of them. For instance, I for one shall never establish any commercial enterprise. Yet I am constantly benefitting from the fact that other people can and do use their freedoms to enter the market as new competitors with those who are at present supplying goods and services I buy.

3. Another rich source of confusion lies in the fact that there are those who want to restrict the word "liberty" to only those freedoms that they think we ought to have; and which, if available, they think we are morally required or at least entitled to exercise. Thus, in his essay on the *Tenure of Kings and Magistrates,* John Milton, the poet and champion of the liberty of unlicensed printing, wrote, "None can love freedom but good men; the rest love not freedom but license." At the end of the following century, men of quite another stamp, proto-Leninists of the French Jacobin clubs, used to say, "No man is free in doing evil. To prevent him is to set him free."

Any such recommendation for a change in our verbal usage should be rejected without hesitation. For it conceals the essential truth. Even liberties that it was agreed we ought not to have at all, or which no one, though having, ought to exercise, remain still, like any other liberties, absences of external coercion or constraint.

In the present context it is essential to insist upon that qualification "external." It is correct English, and often true, to say such things as "I was forced to do it, I had promised"; or "I could not help myself, I felt so ashamed." But these are constraints of a very different kind from the obstacles put in our way by other people. It is those last, and only those last, with which we are concerned here.

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It may sometimes and for some people be the course of prudence to recognize that some kinds of external coercion or constraint may be irremovable, at least by them; and hence that, at least for them, it may be realistic to react by somehow abandoning or disengaging all those desires to the satisfaction of which the irremovable kinds of coercion or constraint constitute an obstacle. But what you become, by thus "emancipating yourself from enslavement" to those unsatisfiable desires is most emphatically not, in the relevant respects and the relevant understanding, free or at liberty.

Certainly there was something magnificent in the deathbed response of the Stoic sage Posidonius. Suffering agonies, he insisted, as his philosophy required, that these, like everything else, were expressions of the Cosmic Reason and therefore welcome: "Do your worst, pain; no matter what you do, you cannot make me hate you." Yet, whether or not this response is to be accounted a manifestation of the spiritual freedom of Posidonius, freedom in the political understanding neither is nor can be any kind of recognition of necessity. It is, rather, the opening of alternatives, whether these be good or bad, desired or undesired.

4. Liberties, though they can be secured only by powerful positive measures, are in themselves—like peace and health—essentially negative. There is a temptation to argue that nothing so important and so good as freedom, or peace, or health, can in truth be merely negative. These misobservations are then gleefully seized on as offering opportunities for the observers to commend their personal agenda as constituting the elements of *true, positive* whichever it may be. It then emerges, in the present case, that a man is endowed with *positive* freedom not insofar as he "is not hindered to do what he hath the will to do" but inasmuch as he is in fact—perhaps more nilly than willy—behaving in some approved way.[5]

Programs for the promotion of particular sorts of behaviour—often programs proposing the employment of every means of compulsion—can thus be commended as promising the realization of an alternative conception of *freedom;* an alternative superior and hence referring to what alone is, supposedly, properly describable as freedom. Gullible or sometimes perhaps themselves intentionally gulling interpreters are then all too ready to respond by misrepresenting thinkers who were in fact pursuing altogether different or actually incompatible ends as if these thinkers had been close political associates of the author of *On Liberty.*[6]

The truth is that "positive" in the expression "positive freedom" is what the Scholastics called an alienans adjective. Positive freedom is thus no more a kind of freedom than imaginary horses or Soviet democracy are kinds of horses or kinds of democracy. Certainly it appears to be almost irresistibly tempting to assume that it is the positive-sounding terms "liberty," "peace," or "health" rather than "unfreedom," "war" or "disease" that are, so to speak, logically dominant. But again the truth is that it is the seemingly negative notion rather than the apparently positive that—in J. L. Austin's memorably inelegant phrase—"wears the trousers." For, as the same sage continued, "commonly enough the

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'negative' (looking) word marks the (positive) abnormality, while the 'positive' word . . . merely serves to rule out the suggestion of that abnormality.''[7]

2. Freedom of the Will

Turning now to the second sort of understanding of our two key terms, we may truly be said to be endowed with free will when and insofar as—in a strong sense soon to be elucidated—we could do or could have done other than we do do or did do. The intended reference is to the familiar fact that, always throughout our waking lives, we are all of us agents, although the scope of that agency varies not only from one individual to another but also, from time to time, in one and the same individual—whether in sickness or in health, whether in maturity or in senility. Necessarily, as agents, we can and cannot but make choices. Equally necessarily, as agents, in a sense shortly to be elucidated, we always could do or could have done other than we do do or did do.

(i) What makes the use of the words ''free'' and ''free will'' misleading here is the logical fact that all agency is not, as such and necessarily, free agency. For the man who receives from the Godfather ''an offer he cannot refuse'' is in a crucially different case from the errant mafioso who is without warning gunned down from behind. As the latter collapses into a pool of his own blood, he simultaneously ceases both to live and to act. In that very collapse he is no longer an agent at all, but purely a patient. Contrast with him the unfortunate who is told that within thirty seconds either his signature or his brains will be on the document surrendering his property: ''Now choose!'' Although in this transaction far from a free agent, he nevertheless remains an agent still.

He remains an agent because, although the signing is most certainly not done of his own free will, he did—in the more fundamental senses still to be elucidated—have a choice, and he could have done other than he did. Certainly, in the less fundamental but more common senses of these expressions, we do correctly say that people really had no choice or that they could not have done other than they did; when, although it is our belief that in those more fundamental senses they did or they could, nevertheless there were in fact no alternative courses of action open to them that—in either the descriptive or the prescriptive interpretations of ''expect''—they could reasonably have been expected to adopt.[8] These correct and idiomatic usages, like the philosophical abuses of the terms ''free'' and ''free will,'' are seriously misleading. For they draw our attention away from the essentials of agency.

(ii) The better to appreciate what these essentials are, we need now to consult the great chapter ''Of Power'' in *An Essay concerning Human Understanding*[9]. It is as certain as without direct testimonial evidence this sort of thing can be that Hume had this chapter most in mind, perhaps even open before him, when, in both the *Treatise* and the first *Enquiry,* he composed his enormously yet not always happily influential sections ''Of the Idea of Necessary Connexion'' and

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"Of Liberty and Necessity." A critical examination of this seminal chapter in Locke's *Essay,* together with an equally critical examination of the results of Hume's consequent meditations, can yield two very valuable trophies.

(a) First, our study of these classical sources should in the end be sufficient to show us that we all have the most direct and the most inexpugnably certain experience: not only both of physical (as opposed to logical) necessity and of physical (as opposed to logical) impossibility, but also both of being, on some occasions, able to do other than we do do and of being, on other occasions, unable to behave in any other way than that in which we are behaving. Logical necessity and logical impossibility—with which physical necessity and physical impossibility are always implicitly or explicitly contrasted—are, of course, definable without direct reference to the nonlinguistic world: one proposition follows from another with logical necessity if and only if to deny the one while asserting the other would be to contradict yourself; whereas a proposed project, or a supposed situation, is to be dismissed as logically impossible if and only if that very proposal, or that very supposition, is self-contraditory.

(b) Second, once we are seized of these insights, we should be ready to recognize that there is no way in which creatures neither enjoying nor suffering experiences of both these two contrasting kinds could either acquire for themselves, or explicate to others, any of the corresponding notions. If this contention is indeed correct, then if must constitute an objection of overwhelming and decisive force against any doctrine of universal, physically necessitating, determinism. If it really is right, then no one could ever be in a position to assert that the entire Universe is subject to universal and inexorable physical necessitation, without at the same time being in a position to know that any such assertion cannot but be false. For if the very ideas both of physical necessity and of the ability to do other than we do do, both are, and can only be, acquired by references to our abundant experience of the two contrasting kinds of reality to which these ideas refer; then who but the most bigoted of Behavioristic psychologists could continue to insist that, *really,* even paradigm instances of the latter are covert cases of the former?

(iii) Anyone inclined to doubt either the first or especially the second of these two findings should be challenged to excogitate his own explications of all the various notions in the kinds distinguished—including the intellectually indispensable concept, not so far explicitly mentioned, of the contrary-to-fact conditional.

A contrary-to-fact conditional is a proposition of the form, "If this were to have happened (which, as a matter of fact, it did not), then that would have occurred." Such propositions are relevant and of great importance because nomologicals (propositions stating what are thought to constitute laws of nature) can be distinguished from merely material implications (propositions stating—without any implications about what might have been but in fact was not—only not-as-a-matter-of-fact-this-and-not-that) by the logical fact that they entail contrary-to-fact conditionals. Also implicit in the notion of the nomological is

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the idea of physical necessity: it is precisely and only because to assert a nomological is to assert that certain relationships between sorts of logically possible events hold with physical necessity that we become licensed to infer contrary-to-fact conditionals from nomologicals.

Perhaps the challenge put at the beginning of the previous paragraph can, after all, be met. But until and unless it is met, and met convincingly, the prudent philosopher is bound to adopt the archetypical attitude of the man from Missouri who, notoriously, has to be shown. Our own assurance that these things just cannot be shown should be strengthened by considering why Hume failed to locate any suitable sort of parent experiences ("impressions") by reference to which the concepts ("ideas") of physical necessity and physical impossibility could have been legitimated.

This failure, like so much else that is most characteristic of Hume, is to be attributed to his misguided Cartesian insistence upon starting all his philosophical thinking from the position Descartes reached at the end of the second paragraph of Part IV of the *Discourse on Method.* Hume insisted, that is to say, upon thinking of himself as an essentially incorporeal and impotent subject of (always private) experience—as solely a bodiless observer, rather than as the flesh and blood observer-cum-agent he was and all of us are. It is no wonder that such a pure observer was unable to detect in causation anything more than a relationship definable entirely in terms of exclusively material implications; a relationship involving no physical necessities, and carrying no consequences about the contrary-to-fact.[10]

(c) Locke, in the chapter "Of Power," was concerned solely with the sort of power that can be predicated only of people—or of such other putative, quasi-personal beings as the theist God, the Olympian gods, archangels, angels, devils, and other assorted disembodied or ever-bodiless spirits. Let us, therefore, attach to this first sort of power the label "power (personal)." In another sense, which is the only sense in which the word can be applied to inanimate objects and to most of animate nature, a power is simply a disposition to behave in such and such a way, given that such and such preconditions are satisfied. Thus we might say that the "nuclear device" dropped at Nagasaki possessed an explosive power equivalent to that of so many tons of TNT, or that full-weight nylon climbing rope has a breaking strain of (a power to hold up to) 4,500 pounds. Let us label this second sort of power "power (physical)."

A power (personal) is an ability at will either to do or to abstain from doing whatever it may be. Thus we might say that in his heyday J. V. Stalin had the power of life and death over every subject of the Soviet Empire, or that a fertile pair of people of opposite sexes have the power to start a baby. In three characteristically vivid passages, Locke not only explicates both this idea and the contrasting concepts of physical necessity and physical impossibility, but also demonstrates that there can be no question but that all these ideas have abundant

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application. It is regrettable that Locke, in the third of the passages following, mistakes it that he is explaining what is meant not by "an agent" but by "a free agent":

> This at least I think evident, that we find in ourselves a Power to begin or forbear, continue or end several actions of our minds, and motions of our Bodies. . . . This Power . . . thus to order the consideration of any idea, or the forbearing to consider it; or to prefer the motion of any part of the body to its rest, and *vice versa* in any particular instance, is that which we call the Will. (*Essay*, II (xxi) 5, p. 236)

> Everyone, I think, finds in himself a Power to begin or forbear, continue or put an end to several Actions in himself. From the consideration of the extent of this power over the actions of the Man, which everyone finds in himself, arise the Ideas of Liberty and Necessity. (Ibid., II (xxi) 7, p. 237)

> We have instances enough, and often more than enough in our own bodies. A Man's Heart beats, and the Blood circulates, which 'is not in his Power . . . to stop; and therefore in respect of these Motions, where rest depends not on his choice . . . he is not a free agent. Convulsive Motions agitate his legs, so that though he wills it never so much, he cannot . . . stop their motion (as in that odd disease called *chorea Sancti Viti*), but he is perpetually dancing: He is . . . under as much Necessity of moving, as a Stone that falls or a Tennis-ball struck with a Racket. (Ibid., II (xxi) 11, p. 239; the Latin means 'St. Vitus's dance').

3. Deny Free Will and Disdain Political Liberty

If, once we have recognized that we are indeed agents who as such can and cannot but make choices between alternative physically possible courses of action or inaction and who, also as such, possess various kinds and amounts of power (personal), then it becomes obvious both that this complex fact is of enormous and quite fundamental importance for our understanding of the nature of man and that it must have substantial bearing upon consequent questions about which of our choices ought properly to be subject to some external coercion or constraint, and how much and of what kinds. Some years ago now, under the sinister yet altogether fitting title *Beyond Freedom and Dignity*, the doyen of Behavioristic psychology, B. F. Skinner, made what his publishers described as his "definitive statement about man and society".[11] This "definitive statement" provides abundant illustrative material under both heads.

(i) Skinner's catastrophic, misguiding principle is that, to be genuinely scientific, any study of man must eschew all anthropomorphic notions. The explicit and authoritative statement of this grotesque general assumption is possibly more important than anything else in the entire book. For Skinner is saying outright what others more cautious leave implicit. He begins: "We have used the instruments of science; we have counted and measured and compared; but something

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essential to scientific practice is missing in almost all current discussions of human behavior."[12]

It appears that what is missing is, awkwardly, the absence of certain notions that Skinner insists can have no place in any truly scientific discourse. For, he continues, "Although physics soon stopped personifying things . . . it continued for a long time to speak as if they had wills, impulses, feelings, purposes and other fragmentary attributes of an undwelling agent. . . . All this was eventually abandoned, and to good effect. . . ." Nevertheless, deplorably, what should be "the behavioral sciences still appeal to comparable internal states. . . ."[13]

We are, therefore, supposed to regret that "almost everyone who is concerned with human affairs—as political scientist, philosopher, man of letters, economist, psychologist, linguist, sociologist, theologian, educator, or psychotherapist—continues to talk about human behaviour in this prescientific way."[14] We all of us, that is to say, continue to ask for and to offer explanations of the conduct of agents in terms of the plans and the purposes, the desires and decisions, of those agents themselves. But "a scientific analysis," we are told, "shifts both the responsibility and the achievement to the environment."[15]

So it is, it seems, unscientific to claim that anyone, acting as an agent, ever effected anything. Hence certain unnamed Freudians are rebuked for recklessly "assuring their patients that they are free to choose among different courses of action and are in the long run the architects of their own destinies."[16] For Skinner as a psychological scientist the true causes of all human behavior are, and can only be, both environmental and necessitating.

The first reason why Skinner believes that he has to embrace this absurdity is that he misconstrues the expulsion of such notions from physics as the repudiation of essentially superstitious ideas, rather than as the rejection of misapplications of ideas in themselves entirely proper, indeed indispensable. The second reason is more particular. He sees all these ideas as involving and involved in what is for him an utterly unacceptable concept, "autonomous man." He writes, "I deny that freedom exists at all. I must deny it or my program would be absurd. You can't have a science about a subject matter which hops capriciously about."

On the contrary: it is Skinner's actual program that truly is absurd, a programme for erecting a science of human behavior upon the false and perversely factitious assumption that all behaviour is physically necessitated, and none of it the conduct of agents who always as such could do other than they in fact do do. Skinner is wrong too in insisting that to admit the reality of agency must be to foreclose on the possibility of discovering causes and developing a science.

The first essential here is to distinguish two crucially different senses of the word "cause." For there is an absolutely fundamental difference between, on the one hand, ensuring that some person will act in one particular way by providing them with some overwhelmingly strong reason so to do; and, on the other hand, making some purely physical phenomenon happen by bringing about the causally

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sufficient conditions of its occurrence. That absolutely fundamental difference is that, whereas such sufficient physical causes necessarily necessitate the occurrence of their effects, correspondingly sufficient moral causes do not. If, for instance, I convey to you some splendid news—news that, if you decided to celebrate, you and everyone else would point to as the cause of that celebration—then I do not by so doing ensure that you must, willy-nilly, make whoopee. Actions that are thus caused by moral causes are neither uncaused nor necessarily capricious and inexplicable; although, inasmuch as they are indeed actions, it is impossible for them to be physically necessitated. It is equally mistaken to assume—as most professing social scientists apparently do assume—that all environmental causes are, in the sense explained, physical, and therefore physically necessitating.

(ii) Since he denies outright the reality of agency and choice, Skinner is bound to make a shambles of all the crucial distinctions. And so he does.

(a) First, he refuses to recognize any real difference between a setup in which abortion is illegal and one in which it is not. In the latter case, "The individual is 'permitted' to decide the issue for himself [*sic*], simply in the sense that he [*sic*] will act because of consequences to which legal punishment is no longer to be added."[17] Well yes, I suppose, precisely in that sense; and exactly that is what it is all about.

(b) Second, he considers "the practice of inviting prisoners to volunteer for possibly dangerous experiments—for example, on new drugs—in return for better living conditions or shorter sentences." He asks, rhetorically, "but are they really free when positively reinforced. . . .?"[18] Since positive reinforcement is Skinner's technical way of talking about the promised rewards, the correct answer is clearly "yes." The contrast is, for instance, with those prisoners in Belsen and Dachau who were forced to become subjects for medical experimentation.

(c) Third, "A person never becomes truly self-reliant. Even though he deals effectively with things, he is necessarily dependent upon those who have taught him to do so."[19] But what self-reliance excludes is present dependence, not having been so educated in the past that you have now become self-reliant.

(d) Fourth, and finally, Skinner refuses to allow any important difference between persuasion by the giving of reasons and "persuasion" by forcible methods of mind-bending: "'Brain-washing' is proscribed by those who otherwise condone the changing of minds, simply because the control is obvious."[20] But the issue is not between what is overt as opposed to what is covert. It is rather a matter of giving or not giving what are, or are thought to be, good reasons, as well as of employing or not employing force and the threat of force.

Politically libertarian hopes perhaps rise a little when we read: "Permissive practices have many advantages." Any such hopes are soon dashed: "Permissiveness is not, however, a policy; it is the abandonment of policy, and its apparent

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advantages are illusory. To refuse to control is to leave control not to the person himself, but to other parts of the social and non-social environment."[21]

This statement is on two counts obnoxious. First, even if I have got to be controlled either by a person or by impersonal forces, still the difference between these alternatives matters enormously. If, for instance, I suffer something painful I am much less upset if I believe my suffering to be the result of blind forces than if I believe it to be someone's malign intention. (This is one reason why a moment's thought makes the ideal of a totally planned society so repellent to all but those who see themselves as the total planners; and, correspondingly, so endlessly enchanting to actual or aspiring members of such power elites.)

Second, Skinner's contention that leaving control to the person himself is an illusion is supported only by his insistence that the true and always necessitating causes of human behavior are, and can only be, environmental. This popular misconception has been demolished already. Furthermore, it is a misconception peculiarly incongruous with the program proclaimed in Skinner's earlier utopian novel *Walden Two;*[21] a program, that is, under which the unenlightened psychologically lay masses are to be controlled—for our own good, of course—by a psychologically initiated elite. But how, upon Skinner's principles as proclaimed in *Beyond Freedom and Dignity,* can it become right to say that in Skinner's utopia it would be Skinner's Controllers who would be controlling the lesser breeds, rather than the environment of the Controllers that would be ultimately controlling everybody? To be an action for which an agent can be ultimately responsible, that action must be—as all true actions necessarily are—a first cause not itself brought about by any physically necessitating causes.

NOTES

1. Antony Flew, "Could there be Universal Natural Rights," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982), pp. 277–88.
2. Quoted by Isaiah Berlin in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p. 122 n.
3. *Leviathan,* Chapter XXI, second paragraph.
4. *Le Lys Rouge* (Paris, 1894), p. 117.
5. Thus Steven Lukes in the chapter entitled "Freedom and Emancipation" in his *Marxism and Morality* (New York: Oxford University Press, 1985) pretends to see and to meet a need to explain why (classical) "liberals are often drawn to an opportunity rather than an exercise conception of freedom, according to which my freedom is solely a matter of how many doors are open to me" (p. 76). But what is there to explain in the fact that people who are ingenuously and sincerely devoted to freedom are "drawn to" the genuine article rather than to tawdry substitutes meretriciously and deceitfully packaged as *positive* freedom?
6. Compare, for instance, Lukes, *Marxism.* No friend of unilateral disarmament in face of Leninist imperialism could be a friend of John Stuart Mill!
7. J. L. Austin, *Philosophical Papers,* J. O. Urmson and G. J. Warnock, eds., rev. ed. (Oxford: Clarendon Press, 1970), p. 192.
8. See, for an explanation of this distinction, my *Thinking Straight* (Buffalo: Prometheus, 1977), Sections 5.9 and 6.11.

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9. John Locke, *An Essay concerning Human Understanding*, P. H. Nidditch, ed. (Oxford: Clarendon Press, 1975), Book II Chapter 21.
10. For a full development of this theme compare my *David Hume: Philosopher of Moral Science* (Oxford: Basil Blackwell, 1986).
11. B. F. Skinner, *Beyond Freedom and Dignity* (New York: Alfred A. Knopf, 1971).
12. Ibid., p. 7.
13. Ibid., p. 8.
14. Ibid., p. 9.
15. Ibid., p. 25.
16. Ibid., pp. 20–21.
17. Ibid., p. 97.
18. Ibid., p. 39.
19. Ibid., p. 91.
20. Ibid., p. 69.
21. Ibid., p. 84.
22. B. F. Skinner, *Walden Two* (New York: Macmillan Co., 1948).

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World War I as Fulfillment: Power and the Intellectuals*

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I. Introduction

In contrast to older historians who regarded World War I as the destruction of progressive reform, I am convinced that the war came to the United States as the "fulfillment," the culmination, the veritable apotheosis of progressivism in American life.[1] I regard progressivism as basically a movement on behalf of Big Government in all walks of the economy and society, in a fusion or coalition between various groups of big businessmen, led by the House of Morgan, and rising groups of technocratic and statist intellectuals. In this fusion, the values and interests of both groups would be pursued through government. Big business would be able to use the government to cartelize the economy, restrict competition, and regulate production and prices, and also to be able to wield a militaristic and imperialist foreign policy to force open markets abroad and apply the sword of the State to protect foreign investments. Intellectuals would be able to use the government to restrict entry into their professions and to assume jobs in Big Government to apologize for, and to help plan and staff, government operations. Both groups also believed that, in this fusion, the Big State could be used to harmonize and interpret the "national interest" and thereby provide a "middle way" between the extremes of "dog-eat-dog" laissez faire and the bitter conflicts of proletarian Marxism. Also animating both groups of progressives was a postmillennial pietist Protestantism that had conquered "Yankee" areas of northern Protestantism by the 1830s and had impelled the pietists to use local, state, and finally federal governments to stamp out "sin," to make America and eventually the world holy, and thereby to bring about the Kingdom of God on earth. The victory of the Bryanite forces at the Democratic national convention of 1896 destroyed the Democratic Party as the

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vehicle of "liturgical" Roman Catholics and German Lutherans devoted to personal liberty and laissez faire and created the roughly homogenized and relatively nonideological party system we have today. After the turn of the century, this development created an ideological and power vacuum for the expanding number of progressive technocrats and administrators to fill. In that way, the locus of government shifted from the legislature, at least partially subject to democratic check, to the oligarchic and technocratic executive branch.

World War I brought the fulfillment of all these progressive trends. Militarism, conscription, massive intervention at home and abroad, a collectivized war economy, all came about during the war and created a mighty cartelized system that most of its leaders spent the rest of their lives trying to recreate, in peace as well as war. In the World War I chapter of his outstanding work, *Crisis and Leviathan,* Professor Robert Higgs concentrates on the war economy and illuminates the interconnections with conscription. In this paper, I would like to concentrate on an area that Professor Higgs relatively neglects: the coming to power during the war of the various groups of progressive intellectuals.[2] I use the term "intellectual" in the broad sense penetratingly described by F. A. Hayek: that is, not merely theorists and academicians, but also all manner of opinion-molders in society—writers, journalists, preachers, scientists, activists of all sorts—what Hayek calls "secondhand dealers in ideas."[3] Most of these intellectuals, of whatever strand or occupation, were either dedicated, messianic postmillennial pietists or else former pietists, born in a deeply pietist home, who, though now secularized, still possessed an intense messianic belief in national and world salvation through Big Government. But, in addition, oddly but characteristically, most combined in their thought and agitation messianic moral or religious fervor with an empirical, allegedly "value-free" and strictly "scientific" devotion to social science. Whether it be the medical profession's combined scientific and moralistic devotion to stamping out sin or a similar position among economists or philosophers, this blend is typical of progressive intellectuals.

In this paper, I will be dealing with various examples of individual or groups of progressive intellectuals, exulting in the triumph of their creed and their own place in it, as a result of America's entry into World War I. Unfortunately, limitations of space and time preclude dealing with all facets of the wartime activity of progressive intellectuals; in particular, I regret having to omit treatment of the conscription movement, a fascinating example of the creed of the "therapy" of "discipline" led by upper-class intellectuals and businessmen in the J. P. Morgan ambit.[4] I shall also have to omit both the highly significant trooping to the war colors of the nation's preachers, and the wartime impetus toward the permanent centralization of scientific research.[5]

There is no better epigraph for the remainder of this paper than a congratulatory note sent to President Wilson after the delivery of his war message on April 2, 1917. The note was sent by Wilson's son-in-law and fellow Southern pietist and

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progressive, Secretary of the Treasury William Gibbs McAdoo, a man who had spent his entire life as an industrialist in New York City, solidly in the J. P. Morgan ambit. McAdoo wrote to Wilson: "You have done a great thing nobly! I firmly believe that it is God's will that America should do this transcendent service for humanity throughout the world and that you are His chosen instrument."[6] It was not a sentiment with which the president could disagree.

II. Pietism and Prohibition

One of the few important omissions in Professor Higgs's book is the crucial role of postmillennial pietist Protestantism in the drive toward statism in the United States. Dominant in the "Yankee" areas of the North from the 1830s on, the aggressive "evangelical" form of pietism conquered Southern Protestantism by the 1890s and played a crucial role in progressivism after the turn of the century and through World War I. Evangelical pietism held that requisite to any man's salvation is that he do his best to see to it that everyone else is saved, and doing one's best inevitably meant that the State must become a crucial instrument in maximizing people's chances for salvation. In particular, the State plays a pivotal role in stamping out sin, and in "making America holy." To the pietists, sin was very broadly defined as any force that might cloud men's minds so that they could not exercise their theological free will to achieve salvation. Of particular importance were slavery (until the Civil War), Demon Rum, and the Roman Catholic Church, headed by the AntiChrist in Rome. For decades after the Civil War, "rebellion" took the place of slavery in the pietist charges against their great political enemy, the Democratic party.[7] Then in 1896, with the evangelical conversion of Southern Protestantism and the admission to the Union of the sparsely populated and pietist Mountain states, William Jennings Bryan was able to put together a coalition that transformed the Democrats into a pietist party and ended forever that party's once proud role as the champion of "liturgical" (Catholic and High German Lutheran) Christianity and of personal liberty and laissez faire.[8,9]

The pietists of the nineteenth and early twentieth centuries were all postmillennialist: They believed that the Second Advent of Christ will occur only *after* the millennium—a thousand years of the establishment of the Kingdom of God on earth—has been brought about by human effort. Postmillennialists have therefore tended to be statists, with the State becoming an important instrument of stamping out sin and Christianizing the social order so as to speed Jesus' return.[10]

Professor Timberlake neatly sums up this politico-religious conflict:

> Unlike those extremist and apocalyptic sects that rejected and withdrew from the world as hopelessly corrupt, and unlike the more conservative churches, such as the Roman Catholic, Protestant Episcopal, and Lutheran, that tended to assume a more relaxed attitude toward the influence of religion in culture, evangelical Protestantism sought to overcome the corruption of the world

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> in a dynamic manner, not only by converting men to belief in Christ but also by Christianizing the social order through the power and force of law. According to this view, the Christian's duty was to use the secular power of the state to transform culture so that the community of the faithful might be kept pure and the work of saving the unregenerate might be made easier. Thus the function of law was not simply to restrain evil but to educate and uplift.[11]

Both prohibition and progressive reform were pietistic, and as both movements expanded after 1900 they became increasingly intertwined. The Prohibition Party, once confined—at least in its platform—to a single issue, became increasingly and frankly progressive after 1904. The Anti-Saloon League, the major vehicle for prohibitionist agitation after 1900, was also markedly devoted to progressive reform. Thus at the League's annual convention in 1905, Rev. Howard H. Russell rejoiced in the growing movement for progressive reform and particularly hailed Theodore Roosevelt, as that "leader of heroic mould, of absolute honesty of character and purity of life, that foremost man of this world. . . ."[12] At the Anti-Saloon League's convention of 1909, Rev. Purley A. Baker lauded the labor union movement as a holy crusade for justice and a square deal. The League's 1915 convention, which attracted 10,000 people, was noted for the same blend of statism, social service, and combative Christianity that had marked the national convention of the Progressive Party in 1912.[13] And at the League's June 1916 convention, Bishop Luther B. Wilson stated, without contradiction, that everyone present would undoubtedly hail the progressive reforms then being proposed.

During the Progressive years, the Social Gospel became part of the mainstream of pietist Protestantism. Most of the evangelical churches created commissions on social service to promulgate the Social Gospel, and virtually all of the denominations adopted the Social Creed drawn up in 1912 by the Commission of the Church and Social Service of the Federal Council of Churches. The creed called for the abolition of child labor, the regulation of female labor, the right of labor to organize (i.e., compulsory collective bargaining), the elimination of poverty, and an "equitable" division of the national product. And right up there as a matter of social concern was the liquor problem. The creed maintained that liquor was a grave hindrance toward the establishment of the Kingdom of God on earth, and it advocated the "protection of the individual and society from the social, economic, and moral waste of the liquor traffic."[14]

The Social Gospel leaders were fervent advocates of statism and of prohibition. These included Rev. Walter Rauschenbusch and Rev. Charles Stelzle, whose tract *Why Prohibition!* (1918) was distributed, after the United States' entry into World War I, by the Commission on Temperance of the Federal Council of Churches to labor leaders, members of Congress, and important government officials. A particularly important Social Gospel leader was Rev. Josiah Strong, whose monthly journal, *The Gospel of the Kingdom,* was published by Strong's

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American Institute of Social Service. In an article supporting prohibition in the July 1914 issue, *The Gospel of the Kingdom* hailed the progressive spirit that was at last putting an end to "personal liberty":

> "Personal Liberty" is at last an uncrowned, dethroned king, with no one to do him reverence. The social consciousness is so far developed, and is becoming so autocratic, that institutions and governments must give heed to its mandate and share their life accordingly. We are no longer frightened by that ancient bogy—"paternalism in government." We affirm boldly, it is the business of government to be just that—paternal. . . . *Nothing human can be foreign to a true government.*[15]

As true crusaders, the pietists were not content to stop with the stamping out of sin in the United States alone. If American pietism was convinced that Americans were God's chosen people, destined to establish a Kingdom of God within the United States, surely the pietists' religious and moral duty could not stop there. In a sense, the world was America's oyster. As Professor Timberlake put it, once the Kingdom of God was in the course of being established in the United States, "it was therefore America's mission to spread these ideals and institutions abroad so that the Kingdom could be established throughout the world. American Protestants were accordingly not content merely to work for the kingdom of God in America, but felt compelled to assist in the reformation of the rest of the world also."[16]

American entry into World War I provided the fullfillment of prohibitionist dreams. In the first place, all food production was placed under the control of Herbert Hoover, Food Administration czar. But if the U.S. government was to control and allocate food resources, shall it permit the precious scarce supply of grain to be siphoned off into the "waste," if not the sin, of the manufacture of liquor? Even though less than two percent of American cereal production went into the manufacture of alcohol, think of the starving children of the world who might otherwise be fed. As the progressive weekly *The Independent* demagogically phrased it, "Shall the many have food, or the few have drink?"

For the ostensible purpose of "conserving" grain, Congress wrote an amendment into the Lever Food and Fuel Control Act of August 10, 1917, that absolutely prohibited the use of foodstuffs, hence grain, in the production of alcohol. Congress would have added a prohibition on the manufacture of wine or beer, but President Wilson persuaded the Anti-Saloon League that he could accomplish the same goal more slowly and thereby avoid a delaying filibuster by the wets in Congress. However, Herbert Hoover, a progressive and a prohibitionist, persuaded Wilson to issue an order, on December 8, both greatly reducing the alcoholic content of beer and limiting the amount of foodstuffs that could be used in its manufacture.[17]

The prohibitionists were able to use the Lever Act and war patriotism to good effect. Thus, Mrs. W. E. Lindsey, wife of the governor of New Mexico, delivered a speech in November 1917 that noted the Lever Act, and declared:

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> Aside from the long list of awful tragedies following in the wake of the liquor traffic, the economic waste is too great to be tolerated at this time. With so many people of the allied nations near to the door of starvation, it would be criminal ingratitude for us to continue the manufacture of whiskey.[18]

Another rationale for prohibition during the war was the alleged necessity to protect American soldiers from the dangers of alcohol to their health, their morals, and their immortal souls. As a result, in the Selective Service Act of May 18, 1917, Congress provided that dry zones must be established around every army base, and it was made illegal to sell or even to give liquor to any member of the military establishment within those zones, even in one's private home. Any inebriated servicemen were subject to courts-martial.

But the most severe thrust toward national prohibition was the Anti-Saloon League's proposed eighteenth constitutional amendment, outlawing the manufacture, sale, transportation, import or export of all intoxicating liquors. It was passed by Congress and submitted to the states at the end of December 1917. Wet arguments that prohibition would prove unenforceable were met with the usual dry appeal to high principle: Should laws against murder and robbery be repealed simply because they cannot be completely enforced? And arguments that private property would be unjustly confiscated were also brushed aside with the contention that property injurious to the health, morals, and safety of the people had always been subject to confiscation without compensation.

When the Lever Act made a distinction between hard liquor (forbidden) and beer and wine (limited), the brewing industry tried to save their skins by cutting themselves loose from the taint of distilled spirits. "The true relationship with beer," insisted the United States Brewers Association, "is with light wines and soft drinks—not with hard liquors. . . ." The brewers affirmed their desire to "sever, once for all, the shackles that bound our wholesome productions . . . to ardent spirits. . . ." But this craven attitude would do the brewers no good. After all, one of the major objectives of the drys was to smash the brewers, once and for all, they whose product was the very embodiment of the drinking habits of the hated German-American masses, both Catholic and Lutheran, liturgicals and beer drinkers all. German-Americans were now fair game. Were they not all agents of the satanic Kaiser, bent on conquering the world? Were they not conscious agents of the dreaded Hun *Kultur*, out to destroy American civilization? And were not most brewers German?

And so the Anti-Saloon League thundered that "German brewers in this country have rendered thousands of men inefficient and are thus crippling the Republic in its war on Prussian militarism." Apparently, the Anti-Saloon League took no heed of the work of German brewers *in Germany*, who were presumably performing the estimable service of rendering "Prussian militarism" helpless. The brewers were accused of being pro-German, and of subsidizing the press (apparently it was all right to be pro-English or to subsidize the press if one were not

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a brewer). The acme of the accusations came from one prohibitionist: "We have German enemies," he warned, "in this country too. And the worst of all our German enemies, the most treacherous, the most menacing are Pabst, Schlitz, Blatz, and Miller."[19]

In this sort of atmosphere, the brewers didn't have a chance, and the Eighteenth Amendment went to the states, outlawing all forms of liquor. Since twenty-seven states had already outlawed liquor, this meant that only nine more were needed to ratify this remarkable amendment, which directly involved the federal constitution in what had always been, at most, a matter of police power of the states. The thirty-sixth state ratified the Eighteenth Amendment on January 16, 1919, and by the end of February all but three states (New Jersey, Rhode Island, and Connecticut) had made liquor unconstitutional as well as illegal. Technically, the amendment went into force the following January, but Congress speeded matters up by passing the War Prohibition Act of November 11, 1918, which banned the manufacture of beer and wine after the following May and outlawed the sale of all intoxicating beverages after June 30, 1919, a ban to continue in effect until the end of demobilization. Thus total national prohibition really began on July 1, 1919, with the Eighteenth Amendment taking over six months later. The constitutional amendment needed a congressional enforcing act, which Congress supplied with the Volstead (or National Prohibition) Act, passed over Wilson's veto at the end of October 1919.

With the battle against Demon Rum won at home, the restless advocates of pietist prohibitionism looked for new lands to conquer. Today America, tomorrow the world. In June 1919 the triumphant Anti-Saloon League called an international prohibition conference in Washington and created a World League Against Alcoholism. World prohibition, after all, was needed to finish the job of making the world safe for democracy. The prohibitionists' goals were fervently expressed by Rev. A. C. Bane at the Anti-Saloon League's 1917 convention, when victory in America was already in sight. To a wildly cheering throng, Bane thundered:

> America will "go over the top" in humanity's greatest battle [against liquor] and plant the victorious white standard of Prohibition upon the nation's loftiest eminence. Then catching sight of the beckoning hands of our sister nations across the sea, struggling with the same age-long foe, we will go forth with the spirit of the missionary and the crusader to help drive the demon of drink from all civilization. With America leading the way, with faith in Omnipotent God, and bearing with patriotic hands our stainless flag, the emblem of civic purity, we will soon . . . bestow upon mankind the priceless gift of World Prohibition.[20]

Fortunately, the prohibitionists found the reluctant world a tougher nut to crack.

III. Women at War and at the Polls

Another direct outgrowth of World War I, coming in tandem with prohibition but lasting more permanently, was the Nineteenth Amendment, submitted by Con-

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gress in 1919 and ratified by the following year, which allowed women to vote. Women's suffrage had long been a movement directly allied with prohibition. Desperate to combat a demographic trend that seemed to be going against them, the evangelical pietists called for women's suffrage (and enacted it in many Western states). They did so because they knew that while pietist women were socially and politically active, ethnic or liturgical women tended to be culturally bound to hearth and home and therefore far less likely to vote. Hence, women's suffrage would greatly increase pietist voting power. In 1869 the Prohibitionist Party became the first party to endorse women's suffrage, which it continued to do. The Progressive Party was equally enthusiastic about female suffrage; it was the first major national Party to permit women delegates at its conventions. A leading women's suffrage organization was the Women's Christian Temperance Union, which reached an enormous membership of 300,000 by 1900. And three successive presidents of the major women's suffrage group, the National American Woman Suffrage Association—Susan B. Anthony, Mrs. Carrie Chapman Catt and Dr. Anna Howard Shaw—all began their activist careers as prohibitionists. Susan B. Anthony put the issue clearly:

> There is an enemy of the homes of this nation and that enemy is drunkenness. Everyone connected with the gambling house, the brothel and the saloon works and votes solidly against the enfranchisement of women, and, I say, if you believe in chastity, if you believe in honesty and integrity, then . . . take the necessary steps to put the ballot in the hands of women.[21]

For its part, the German-American Alliance of Nebraska sent out an appeal during the unsuccessful referendum in November 1914 on women suffrage. Written in German, the appeal declared, "Our German women do not want the right to vote, and since our opponents desire the right of suffrage mainly for the purpose of saddling the yoke of prohibition on our necks, we should oppose it with all our might. . . ."[22]

America's entry into World War I provided the impetus for overcoming the substantial opposition to woman suffrage, as a corollary to the success of prohibition and as a reward for the vigorous activity by organized women in behalf of the war effort. To close the loop, much of that activity consisted in stamping out vice and alcohol as well as instilling "patriotic" education into the minds of often suspect immigrant groups.

Shortly after the U.S. declaration of war, the Council of National Defense created an Advisory Committee on Women's Defense Work, known as the Woman's Committee. The purpose of the committee, writes a celebratory contemporary account, was "to coordinate the activities and the resources of the organized and unorganized women of the country, that their power may be immediately utilized in time of need, and to supply a new and direct channel of cooperation between women and governmental departments."[23] Chairman of the Woman's Committee, working energetically and full time, was the former president of the

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National American Woman Suffrage Association, Dr. Anna Howard Shaw, and another leading member was the suffrage group's current chairman and an equally prominent suffragette, Mrs. Carrie Chapman Catt.

The Woman's Committee promptly set up organizations in cities and states across the country, and on June 19, 1917 convened a conference of over fifty national women's organizations to coordinate their efforts. It was at this conference that "the first definite task was imposed upon American women" by the indefatigable Food Czar, Herbert Hoover.[24] Hoover enlisted the cooperation of the nation's women in his ambitious campaign for controlling, restricting, and cartelizing the food industry in the name of "conservation" and elimination of "waste." Celebrating this coming together of women was one of the Woman's Committee members, the Progressive writer and muckraker Mrs. Ida M. Tarbell. Mrs. Tarbell lauded the "growing consciousness everywhere that this great enterprise for democracy which we are launching [the U.S. entry into the war] is a national affair, and if an individual or a society is going to do its bit it must act with and under the government at Washington." "Nothing else," Mrs. Tarbell gushed, "can explain the action of the women of the country in coming together as they are doing today under one centralized direction."[25]

Mrs. Tarbell's enthusiasm might have been heightened by the fact that she was one of the *directing* rather than the *directed.* Herbert Hoover came to the women's conference with the proposal that each of the women sign and distribute a "food pledge card" on behalf of food conservation. While support for the food pledge among the public was narrower than anticipated, educational efforts to promote the pledge became the basis of the remainder of the women's conservation campaign. The Woman's Committee appointed Mrs. Tarbell as chairman of its committee on Food Administration, and she not only tirelessly organized the campaign but also wrote many letters and newspaper and magazine articles on its behalf.

In addition to food control, another important and immediate function of the Woman's Committee was to attempt to register every woman in the country for possible volunteer or paid work in support of the war effort. Every woman aged sixteen or over was asked to sign and submit a registration card with all pertinent information, including training, experience, and the sort of work desired. In that way the government would know the whereabouts and training of every woman, and government and women could then serve each other best. In many states, especially Ohio and Illinois, state governments set up schools to train the registrars. And even though the Woman's Committee kept insisting that the registration was completely voluntary, the state of Louisiana, as Ida Clarke puts it, developed a "novel and clever" idea to facilitate the program: women's registration was made compulsory.

Louisiana's Governor Ruffin G. Pleasant decreed October 17, 1917 compulsory registration day, and a host of state officials collaborated in its operation. The

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State Food Commission made sure that food pledges were also signed by all, and the State School Board granted a holiday on October 17 so that teachers could assist in the compulsory registration, especially in the rural districts. Six thousand women were officially commissioned by the state of Louisiana to conduct the registration, and they worked in tandem with state Food Conservation officials and parish Demonstration Agents. In the French areas of the state, the Catholic priests rendered valuable aid in personally appealing to all their female parishioners to perform their registration duties. Handbills were circulated in French, house-to-house canvasses were made, and speeches urging registration were made by women activists in movie theaters, schools, churches, and courthouses. We are informed that all responses were eager and cordial; there is no mention of any resistance. We are also advised that "even the negroes were quite alive to the situation, meeting sometimes with the white people and sometimes at the call of their own pastors."[26]

Also helping out in women's registration and food control was another, smaller, but slightly more sinister women's organization that had been launched by Congress as a sort of prewar wartime group at a large Congress for Constructive Patriotism, held in Washington, D.C. in late January 1917. This was the National League for Woman's Service (NLWS), which established a nationwide organization later overshadowed and overlapped by the larger Woman's Committee. The difference was that the NLWS was set up on quite frankly military lines. Each local working unit was called a "detachment" under a "detachment commander," districtwide and statewide detachments met in annual "encampments," and every woman member was to wear a uniform with an organization badge and insignia. In particular, "the basis of training for all detachments is standardized, physical drill."[27]

A vital part of the Woman's Committee work was engaging in "patriotic education." The government and the Woman's Committee recognized that immigrant ethnic women were most in need of such vital instruction, and so it set up a committee on education, headed by the energetic Mrs. Carrie Chapman Catt. Mrs. Catt stated the problem well to the Woman's Committee: Millions of people in the United States were unclear on why we were at war, and why, as Ida Clarke paraphrases Mrs. Catt, there is "the imperative necessity of winning the war if future generations were to be protected from the menace of an unscrupulous militarism."[28] Presumably U.S. militarism, being "scrupulous," posed no problem.

Apathy and ignorance abounded, Mrs. Catt went on, and she proposed to mobilize twenty million American women, the "greatest sentiment makers of any community," to begin a "vast educational movement" to get the women "fervently enlisted to push the war to victory as rapidly as possible." As Mrs. Catt continued, however, the clarity of war aims she called for really amounted to pointing out that we were in the war "whether the nation likes it or does not

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like it,'' and that therefore the ''sacrifices'' needed to win the war ''willingly or unwillingly must be made.'' These statements are reminiscent of arguments supporting recent military actions by Ronald Reagan (''He had to do what he had to do''). In the end, Mrs. Catt could come up with only one reasoned argument for the war, apart from this alleged necessity, that it must be won to make it ''the war to end wars.''[29]

The ''patriotic education'' campaign of the organized women was largely to ''Americanize'' immigrant women by energetically persuading them (a) to become naturalized American citizens and (b) to learn ''Mother English.'' In the campaign, dubbed ''America First,'' national unity was promoted through getting immigrants to learn English and trying to get female immigrants into afternoon or evening English classes. The organized patriot women were also worried about preserving the family structure of the immigrants. If the children learn English and their parents remain ignorant, children will scorn their elders, ''parental discipline and control are dissipated, and the whole family fabric becomes weakened. Thus one of the great conservative forces in the community becomes inoperative.'' To preserve ''maternal control of the young'', then, ''Americanization of the foreign women through language becomes imperative.'' In Erie, Pennsylvania, women's clubs appointed ''Block Matrons,'' whose job it was to get to know the foreign families of the neighborhood and to back up school authorities in urging the immigrants to learn English, and who, in the rather naive words of Ida Clarke, ''become neighbors, friends, and veritable mother confessors to the foreign women of the block.'' One would like to have heard some comments from recipients of the attentions of the Block Matrons.

All in all, as a result of the Americanization campaign, Ida Clarke concludes, ''the organized women of this country can play an important part in making ours a country with a common language, a common purpose, a common set of ideals—a unified America.''[30]

Neither did the government and its organized women neglect progressive economic reforms. At the organizing June 1917 conference of the Woman's Committee, Mrs. Carrie Catt emphasized that the greatest problem of the war was to assure that women receive ''equal pay for equal work.'' The conference suggested that vigilance committees be established to guard against the violation of ''ethical laws'' governing labor and also that all laws restricting (''protecting'') the labor of women and children be rigorously enforced. Apparently, there were some values to which maximizing production for the war effort had to take second place. Mrs. Margaret Dreier Robins, president of the National Women's Trade Union's League, hailed the fact that the Woman's Committee was organizing committees in every state to protect minimum standards for women and children's labor in industry and demanded minimum wages and shorter hours for women. Mrs. Robins particularly warned that ''not only are unorganized women workers in vast numbers used as underbidders in the labor market for lowering industrial

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standards, but they are related to those groups in industrial centers of our country that are least Americanized and most alien to our institutions and ideals." And so "Americanization" and cartelization of female labor went hand in hand.[31,32]

IV. Saving Our Boys from Alcohol and Vice

One of organized womanhood's major contributions to the war effort was to collaborate in an attempt to save American soldiers from vice and Demon Rum. In addition to establishing rigorous dry zones around every military camp in the United States, the Selective Service Act of May 1917 also outlawed prostitution in wide zones around the military camps. To enforce these provisions, the War Department had ready at hand a Commission on Training Camp Activities, an agency soon imitated by the Department of the Navy. Both commissions were headed by a man tailormade for the job, the progressive New York settlement-house worker, municipal political reformer, and former student and disciple of Woodrow Wilson, Raymond Blaine Fosdick.

Fosdick's background, life, and career were paradigmatic for progressive intellectuals and activists of that era. Fosdick's ancestors were Yankees from Massachusetts and Connecticut, and his great-grandfather pioneered westward in a covered wagon to become a frontier farmer in the heart of the Burned-Over District of transplanted Yankees, Buffalo, New York. Fosdick's grandfather, a pietist lay preacher born again in a Baptist revival, was a prohibitionist who married a preacher's daughter and became a lifelong public school teacher in Buffalo. Grandfather Fosdick rose to become Superintendant of Education in Buffalo and a battler for an expanded and strengthened public school system.

Fosdick's immediate ancestry continued in the same vein. His father was a public school teacher in Buffalo who rose to become principal of a high school. His mother was deeply pietist and a staunch advocate of prohibition and women's suffrage. Fosdick's father was a devout pietist Protestant and a "fanatical" Republican who gave his son Raymond the middle name of his hero, the veteran Maine Republican James G. Blaine. The three Fosdick children, elder brother Harry Emerson, Raymond, and Raymond's twin sister, Edith, on emerging from this atmosphere, all forged lifetime careers of pietism and social service.

While active in New York reform administration, Fosdick made a fateful friendship. In 1910, John D. Rockefeller, Jr., like his father a pietist Baptist, was chairman of a special grand jury to investigate and to try to stamp out prostitution in New York City. For Rockefeller, the elimination of prostitution was to become an ardent and lifelong crusade. He believed that sin, such as prostitution, must be criminated, quarantined, and driven underground through rigorous suppression. In 1911, Rockefeller began his crusade by setting up the Bureau of Social Hygiene, into which he poured $5 million in the next quarter century. Two years later he enlisted Fosdick, already a speaker at the annual dinner of Rockefeller's

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Baptist Bible class, to study police systems in Europe in conjunction with activities to end the great "social vice." Surveying American police after his stint in Europe at Rockefeller's behest, Fosdick was appalled that police work in the United States was not considered a "science" and that it was subject to "sordid" political influences.[33]

At that point, the new Secretary of War, the progressive former mayor of Cleveland Newton D. Baker, became disturbed at reports that areas near the army camps in Texas on the Mexican border, where troops were mobilized to combat the Mexican revolutionary Pancho Villa, were honeycombed with saloons and prostitution. Sent by Baker on a fact-finding tour in the summer of 1916, scoffed at by tough army officers as the "Reverend," Fosdick was horrified to find saloons and brothels seemingly everywhere in the vicinity of the military camps. He reported his consternation to Baker, and, at Fosdick's suggestion, Baker cracked down on the army commanders and their lax attitude toward alcohol and vice. But Fosdick was beginning to get the glimmer of another idea. Couldn't the suppression of the bad be accompanied by a positive encouragement of the good, of wholesome recreational alternatives to sin and liquor that our boys could enjoy? When war was declared, Baker quickly appointed Fosdick to be chairman of the Commission on Training Camp Activities.

Armed with the coercive resources of the federal government and rapidly building his bureaucratic empire from merely one secretary to a staff of thousands, Raymond Fosdick set out with determination on his twofold task: stamping out alcohol and sin in and around every military camp, and filling the void for American soldiers and sailors by providing them with wholesome recreation. As head of the Law Enforcement Division of the Training Camp Commission, Fosdick selected Bascom Johnson, attorney for the American Social Hygiene Association.[34] Johnson was commissioned a major, and his staff of forty aggressive attorneys became second lieutenants.

Employing the argument of health and military necessity, Fosdick set up a Social Hygiene Division of his commission, which promulgated the slogan "Fit to Fight." Using a mixture of force and threats to remove federal troops from the bases if recalcitrant cities did not comply, Fosdick managed to bludgeon his way into suppressing, if not prostitution in general, then at least every major red light district in the country. In doing so, Fosdick and Baker, employing local police and the federal Military Police, far exceeded their legal authority. The law authorized the president to shut down every red light district in a five-mile zone around each military camp or base. Of the 110 red light districts shut down by military force, however, only 35 were included in the prohibited zone. Suppression of the other 75 was an illegal extension of the law. Nevertheless, Fosdick was triumphant: "Through the efforts of this Commission [on Training Camp Activities] the red light district has practically ceased to be a feature of American city life."[35] The result of this permanent destruction of the red light district, of

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course, was to drive prostitution onto the streets, where consumers would be deprived of the protection of either an open market or of regulation.

In some cases, the federal anti-vice crusade met considerable resistance. Secretary of Navy Josephus Daniels, a progressive from North Carolina, had to call out the marines to patrol the streets of resistant Philadelphia, and naval troops, over the strenuous objections of the mayor, were used to crush the fabled red light district of Storyville, in New Orleans, in November 1917.[36]

In its hubris, the U.S. Army decided to extend its anti-vice crusade to foreign shores. General John J. Pershing issued an official bulletin to members of the American Expeditionary Force in France urging that "sexual continence is the plain duty of members of the A.E.F., both for the vigorous conduct of the war, and for the clean health of the American people after the war." Pershing and the American military tried to close all the French brothels in areas where American troops were located, but the move was unsuccessful because the French objected bitterly. Premier Georges Clemenceau pointed out that the result of the "total prohibition of regulated prostitution in the vicinity of American troops" was only to increase "venereal diseases among the civilian population of the neighborhood." Finally, the United States had to rest content with declaring French civilian areas off limits to the troops.[37]

The more positive part of Raymond Fosdick's task during the war was supplying the soldiers and sailors with a constructive substitute for sin and alcohol, "healthful amusements and wholesome company." As might be expected, the Woman's Committee and organized womanhood collaborated enthusiastically. They followed the injunction of Secretary of War Baker that the government "cannot allow these young men . . . to be surrounded by a vicious and demoralizing environment, nor can we leave anything undone which will protect them from unhealthy influences and crude forms of temptation." The Woman's Committee found, however, that in the great undertaking of safeguarding the health and morals of our boys, their most challenging problem proved to be guarding the morals of their mobilized young girls. For unfortunately, "where soldiers are stationed . . . the problem of preventing girls from being misled by the glamour and romance of war and beguiling uniforms looms large." Fortunately, perhaps, the Maryland Committee proposed the establishment of a "Patriotic League of Honor which will inspire girls to adopt the highest standards of womanliness and loyalty to their country."[38]

No group was more delighted with the achievements of Fosdick and his Miltary Training Camp Commission than the burgeoning profession of social work. Surrounded by handpicked aides from the Playground and Recreation Association and the Russell Sage Foundation, Fosdick and the others "in effect tried to create a massive settlement house around each camp. No army had ever seen anything like it before, but it was an outgrowth of the recreation and community organization movement, and a victory for those who had been arguing for the

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creative use of leisure time."[39] The social work profession pronounced the program an enormous success. The influential *Survey* magazine summed up the result as "the most stupendous piece of social work in modern times."[40]

Social workers were also exultant about prohibition. In 1917, the National Conference of Charities and Corrections (which changed its name around the same time to the National Conference of Social Work) was emboldened to drop whatever value-free pose it might have had and come out squarely for prohibition. On returning from Russia in 1917, Edward T. Devine of the Charity Organization Society of New York exclaimed that "the social revolution which followed the prohibition of vodka was more profoundly important . . . than the political revolution which abolished autocracy." And Robert A. Woods of Boston, the Grand Old Man of the settlement house movement and a veteran advocate of prohibition, predicted in 1919 that the Eighteenth Amendment, "one of the greatest and best events in history," would reduce poverty, wipe out prostitution and crime, and liberate "vast suppressed human potentialities."[41]

Woods, president of the National Conference of Social Work during 1917–18, had long denounced alcohol as "an abominable evil." A postmillennial pietist, he believed in "Christian statesmanship" that would, in a "propaganda of the deed," Christianize the social order in a corporate, communal route to the glorification of God. Like many pietists, Woods cared not for creeds or dogmas but only for advancing Christianity in a communal way; though an active Episcopalian, his "parish" was the community at large. In his settlement work, Woods had long favored the isolation or segregation of the "unfit," in particular "the tramp, the drunkard, the pauper, the imbecile," with the settlement house as the nucleus of this reform. Woods was particularly eager to isolate and punish the drunkard and the tramp. "Inveterate drunkards" were to receive increasing levels of "punishment," with ever lengthier jail terms. The "tramp evil" was to be gotten rid of by rounding up and jailing vagrants, who would be placed in tramp workhouses and put to forced labor.

For Woods the world war was a momentous event. It had advanced the process of "Americanization," a "great humanizing process through which all loyalties, all beliefs must be wrought together in a better order."[42] The war had wonderfully released the energies of the American people. Now, however, it was important to carry the wartime momentum into the postwar world. Lauding the war collectivist society during the spring of 1918, Robert Woods asked the crucial question, "Why should it not always be so? Why not continue in the years of peace this close, vast, wholesome organism of service, of fellowship, of constructive creative power?"[43]

V. The *New Republic* Collectivists

The *New Republic* magazine, founded in 1914 as the leading intellectual organ of progressivism, was a living embodiment of the burgeoning alliance between

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big business interests, in particular the House of Morgan, and the growing legion of collectivist intellectuals. Founder and publisher of the *New Republic* was Willard W. Straight, partner of J. P. Morgan & Co., and its financier was Straight's wife, the heiress Dorothy Whitney. Major editor of the influential new weekly was the veteran collectivist and theoretician of Teddy Roosevelt's New Nationalism, Herbert David Croly. Croly's two coeditors were Walter Edward Weyl, another theoretician of the New Nationalism, and the young, ambitious former official of the Intercollegiate Socialist Society, the future pundit Walter Lippmann. As Woodrow Wilson began to take America into World War I, the *New Republic*, though originally Rooseveltian, became an enthusiastic supporter of the war, and a virtual spokesman for the Wilson war effort, the wartime collectivist economy, and the new society molded by the war.

On the higher levels of ratiocination, unquestionably the leading progressive intellectual, before, during, and after World War I, was the champion of pragmatism, Professor John Dewey of Columbia University. Dewey wrote frequently for the *New Republic* in this period and was clearly its leading theoretician. A Yankee born in 1859, Dewey was, as Mencken put it, "of indestructible Vermont stock and a man of the highest bearable sobriety." John Dewey was the son of a small town Vermont grocer.[44] Although he was a pragmatist and a secular humanist most of his life, it is not as well known that Dewey, in the years before 1900, was a postmillennial pietist, seeking the gradual development of a Christianized social order and Kingdom of God on earth via the expansion of science, community, and the State. During the 1890s, Dewey, as professor of philosophy at the University of Michigan, expounded his vision of postmillennial pietism in a series of lectures before the Students' Christian Association. Dewey argued that the growth of modern science now makes it possible for man to establish the biblical idea of the Kingdom of God on earth. Once humans had broken free of the restraints of orthodox Christianity, a truly religious Kingdom of God could be realized in "the common incarnate Life, the purpose . . . animating all men and binding them together into one harmonious whole of sympathy."[45] Religion would thus work in tandem with science and democracy, all of which would break down the barriers between men and establish the Kingdom. After 1900 it was easy for John Dewey, along with most other postmillennial intellectuals of the period, to shift gradually but decisively from postmillennial progressive Christian statism to progressive secular statism. The path, the expansion of statism and "social control" and planning, remained the same. And even though the Christian creed dropped out of the picture, the intellectuals and activists continued to possess the same evangelical zeal for the salvation of the world that their parents and they themselves had once possessed. The world would and must still be saved through progress and statism.[46]

A pacifist while in the midst of peace, John Dewey prepared himself to lead the parade for war as America drew nearer to armed intervention in the Euro-

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pean struggle. First, in January 1916 in the *New Republic,* Dewey attacked the "professional pacifist's" outright condemnation of war as a "sentimental phantasy," a confusion of means and ends. Force, he declared, was simply "a means of getting results," and therefore could neither be lauded or condemned per se. Next, in April Dewey signed a pro-Allied manifesto, not only cheering for an Allied victory but also proclaiming that the Allies were "struggling to preserve the liberties of the world and the highest ideals of civilization." And though Dewey supported U.S. entry into the war so that Germany could be defeated, "a hard job, but one which had to be done," he was far more interested in the wonderful changes that the war would surely bring about in the domestic American polity. In particular, war offered a golden opportunity to bring about collectivist social control in the interest of social justice. As one historian put it,

> because war demanded paramount commitment to the national interest and necessitated an unprecedented degree of government planning and economic regulation in that interest, Dewey saw the prospect of permanent socialization, permanent replacement of private and possessive interest by public and social interest, both within and among nations.[47]

In an interview with the *New York World* a few months after U.S. entry into the war, Dewey exulted that "this war may easily be the beginning of the end of business." For out of the needs of the war, "we are beginning to produce for use, not for sale, and the capitalist is not a capitalist . . . [in the face of] the war." Capitalist conditions of production and sale are now under government control, and "there is no reason to believe that the old principle will ever be resumed. . . . Private property had already lost its sanctity . . . industrial democracy is on the way."[48] In short, intelligence is at last being used to tackle social problems, and this practice is destroying the old order and creating a new social order of "democratic integrated control." Labor is acquiring more power, science is at last being socially mobilized, and massive government controls are socializing industry. These developments, Dewey proclaimed, were precisely what we are fighting for.[49]

Furthermore, John Dewey saw great possibilities opened by the war for the advent of worldwide collectivism. To Dewey, America's entrance into the war created a "plastic juncture" in the world, a world marked by a "world organization and the beginnings of a public control which crosses nationalistic boundaries and interests," and which would also "outlaw war."[50]

The editors of the *New Republic* took a position similar to Dewey's, except that they arrived at it even earlier. In his editorial in the magazine's first issue in November 1914, Herbert Croly cheerily prophesied that the war would stimulate America's spirit of nationalism and therefore bring it closer to democracy. At first hesitant about the collectivist war economies in Europe, the *New Republic* soon began to cheer and urged the United States to follow the lead of the warring European nations and socialize its economy and expand the powers of the State.

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As America prepared to enter the war, the *New Republic,* examining war collectivism in Europe, rejoiced that "on its administrative side socialism [had] won a victory that [was] superb and compelling." True, European war collectivism was a bit grim and autocratic, but never fear, America could use the selfsame means for "democratic" goals.

The *New Republic* intellectuals also delighted in the "war spirit" in America, for that spirit meant "the substitution of national and social and organic forces for the more or less mechanical private forces operative in peace. . . ." The purposes of war and social reform might be a bit different, but, after all, "they are both purposes, and luckily for mankind a social organization which is efficient is as useful for the one as for the other."[51] Lucky indeed.

As America prepared to enter the war, the *New Republic* eagerly looked forward to imminent collectivization, sure that it would bring "immense gains in national efficiency and happiness." After war was declared, the magazine urged that the war be used as "an aggressive tool of democracy." "Why should not the war serve," the magazine asked, "as a pretext to be used to foist innovations upon the country?" In that way, progressive intellectuals could lead the way in abolishing "the typical evils of the sprawling half-educated competitive capitalism."

Convinced that the United States would attain socialism through war, Walter Lippmann, in a public address shortly after American entry, trumpeted his apocalyptic vision of the future:

> We who have gone to war to insure democracy in the world will have raised an aspiration here that will not end with the overthrow of the Prussian autocracy. We shall turn with fresh interests to our own tyrannies—to our Colorado mines, our autocratic steel industries, sweatshops, and our slums. A force is loose in America. . . . Our own reactionaries will not assuage it. . . . We shall know how to deal with them.[52]

Walter Lippmann, indeed, had been the foremost hawk among the *New Republic* intellectuals. He had pushed Croly into backing Wilson and into supporting intervention, and then had collaborated with Colonel House in pushing Wilson into entering the war. Soon Lippmann, an enthusiast for conscription, had to confront the fact that he himself, only twenty-seven years old and in fine health, was eminently eligible for the draft. Somehow, however, Lippmann failed to unite theory and praxis. Young Felix Frankfurter, progressive Harvard Law Professor and a close associate of the *New Republic* editorial staff, had just been selected as a special assistant to Secretary of War Baker. Lippmann somehow felt that his own inestimable services could be better used planning the postwar world than battling in the trenches. And so he wrote to Frankfurter asking for a job in Baker's office. "What I want to do," he pleaded, "is to devote all my time to studying and speculating on the approaches to peace and the reaction from the peace. Do you think you can get me an exemption on such high-falutin

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grounds?'' He then rushed to reassure Frankfurter that there was nothing ''personal'' in this request. After all, he explained, ''the things that need to be thought out, are so big that there must be no personal element mixed up with this.'' Frankfurter having paved the way, Lippmann wrote to Secretary Baker. He assured Baker that he was only applying for a job and draft exemption on the pleading of others and in stern submission to the national interest. As Lippmann put it in a remarkable demonstration of cant:

> I have consulted all the people whose advice I value and they urge me to apply for exemption. You can well understand that this is not a pleasant thing to do, and yet, after searching my soul as candidly as I know how, I am convinced that I can serve my bit much more effectively than as a private in the new armies.

No doubt.

As icing on the cake, Lippmann added an important bit of ''disinformation.'' For, he piteously wrote to Baker, the fact is ''that my father is dying and my mother is absolutely alone in the world. She does not know what his condition is, and I cannot tell anyone for fear it would become known.'' Apparently, no one else ''knew'' his father's condition either, including his father and the medical profession, for the elder Lippmann managed to peg along successfully for the next ten years.[53]

Secure in his draft exemption, Walter Lippmann hied off in high excitement to Washington, there to help run the war and, a few months later, to help direct Colonel House's secret conclave of historians and social scientists setting out to plan the shape of the future peace treaty and the postwar world. Let others fight and die in the trenches; Walter Lippmann had the satisfaction of knowing that *his* talents, at least, would be put to their best use by the newly emerging collectivist State.

As the war went on, Croly and the other editors, having lost Lippmann to the great world beyond, cheered every new development of the massively controlled war economy. The nationalization of railroads and shipping, the priorities and allocation system, the total domination of all parts of the food industry achieved by Herbert Hoover and the Food Administration, the prounion policy, the high taxes, and the draft were all hailed by the *New Republic* as an expansion of democracy's power to plan for the general good. As the Armistice ushered in the postwar world, the *New Republic* looked back on the handiwork of the war and found it good: ''We revolutionized our society.'' All that remained was to organize a new constitutional convention to complete the job of reconstructing America.[54]

But the revolution had not been fully completed. Despite the objections of Bernard Baruch and other wartime planners, the government decided not to make most of the war collectivist machinery permanent. From then on, the fondest ambition of Baruch and the others was to make the World War I system a perma-

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nent institution of American life. The most trenchant epitaph on the World War I polity was delivered by Rexford Guy Tugwell, the most frankly collectivist of the Brain Trusters of Franklin Roosevelt's New Deal. Looking back on "America's wartime socialism" in 1927, Tugwell lamented that if only the war had lasted longer, that great "experiment" could have been completed: "We were on the verge of having an international industrial machine when peace broke," Tugwell mourned. "Only the Armistice prevented a great experiment in control of production, control of prices, and control of consumption."[55] Tugwell need not have been troubled; there would soon be other emergencies, other wars.

At the end of the war, Lippmann was to go on to become America's foremost journalistic pundit. Croly, having broken with the Wilson Administration on the harshness of the Versailles Treaty, was bereft to find the *New Republic* no longer the spokesman for some great political leader. During the late 1920s he was to discover an exemplary national collectivist leader abroad—in Benito Mussolini.[56] That Croly ended his years as an admirer of Mussolini comes as no surprise when we realize that from early childhood he had been steeped by a doting father in the authoritarian socialist doctrines of Auguste Comte's Positivism. These views were to mark Croly throughout his life. Thus, Herbert's father, David, the founder of Positivism in the United States, advocated the establishment of vast powers of government over everyone's life. David Croly favored the growth of trusts and monopolies as a means both to that end and also to eliminate the evils of individual competition and "selfishness." Like his son, David Croly railed at the Jeffersonian "fear of government" in America, and looked to Hamilton as an example to counter that trend.[57]

And what of Professor Dewey, the doyen of the pacifist intellectuals-turned drumbeaters for war? In a little known period of his life, John Dewey spent the immediate postwar years, 1919–21, teaching at Peking University and travelling in the Far East. China was then in a period of turmoil over the clauses of the Versailles Treaty that transferred the rights of dominance in Shantung from Germany to Japan. Japan had been promised this reward by the British and French in secret treaties in return for entering the war against Germany. The Wilson Administration was torn between the two camps. On the one hand were those who wished to stand by the Allies' decision and who envisioned using Japan as a club against Bolshevik Russia in Asia. On the other were those who had already begun to sound the alarm about a Japanese menace and who were committed to China, often because of connections with the American Protestant missionaries who wished to defend and expand their extraterritorial powers of governance in China. The Wilson Administration, which had originally taken a pro-Chinese stand, reversed itself in the spring of 1919 and endorsed the Versailles provisions.

Into this complex situation John Dewey plunged, seeing no complexity and of course considering it unthinkable for either him or the United States to stay out of the entire fray. Dewey leaped into total support of the Chinese nationalist posi-

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tion, hailing the aggressive Young China movement and even endorsing the pro-missionary YMCA in China as "social workers." Dewey thundered that while "I didn't expect to be a jingo," that Japan must be called to account and that Japan is the great menace in Asia. Thus, scarcely had Dewey ceased being a champion of one terrible world war than he began to pave the way for an even greater one.[58]

VI. Economics in Service of the State: The Empiricism of Richard T. Ely

World War I was the apotheosis of the growing notion of intellectuals as servants of the State and junior partners in State rule. In the new fusion of intellectuals and State, each was of powerful aid to the other. Intellectuals could serve the State by apologizing for and supplying rationales for its deeds. Intellectuals were also needed to staff important positions as planners and controllers of the society and economy. The State could also serve intellectuals by restricting entry into, and thereby raising the income and the prestige of, the various occupations and professions. During World War I, historians were of particular importance in supplying the government with war propaganda, convincing the public of the unique evil of Germans throughout history and of the satanic designs of the Kaiser. Economists, particularly empirical economists and statisticians, were of great importance in the planning and control of the nation's wartime economy. Historians playing preeiminent roles in the war propaganda machine have been studied fairly extensively; economists and statisticians, playing a less blatant and allegedly "value-free" role, have received far less attention.[59]

Although it is an outworn generalization to say that nineteenth century economists were stalwart champions of laissez faire, it is still true that deductive economic theory proved to be a mighty bulwark against government intervention. For, basically, economic theory showed the harmony and order inherent in the free market, as well as the counterproductive distortions and economic shackles imposed by state intervention. In order for statism to dominate the economics profession, then, it was important to discredit deductive theory. One of the most important ways of doing so was to advance the notion that, to be "genuinely scientific," economics had to eschew generalization and deductive laws and simply engage in empirical inquiry into the facts of history and historical institutions, hoping that somehow laws would eventually arise from these detailed investigations. Thus the German Historical School, which managed to seize control of the economics discipline in Germany, fiercely proclaimed not only its devotion to statism and government control, but also its opposition to the "abstract" deductive laws of political economy. This was the first major group within the economics profession to champion what Ludwig von Mises was later to call "anti-economics." Gustav Schmoller, the leader of the Historical School, proudly

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declared that his and his colleagues' major task at the University of Berlin was to form "the intellectual bodyguard of the House of Hohenzollern."

During the 1880s and 1890s bright young graduate students in history and the social sciences went to Germany, the home of the Ph.D. degree, to obtain their doctorates. Almost to a man, they returned to the United States to teach in colleges and in the newly created graduate schools, imbued with the excitement of the "new" economics and political science. It was a "new" social science that lauded the German and Bismarckian development of a powerful welfare-warfare State, a State seemingly above all social classes, that fused the nation into an integrated and allegedly harmonious whole. The new society and polity was to be run by a powerful central government, cartelizing, dictating, arbitrating, and controlling, thereby eliminating competitive laissez-faire capitalism on the one hand and the threat of proletarian socialism on the other. And at or near the head of the new dispensation was to be the new breed of intellectuals, technocrats, and planners, directing, staffing, propagandizing, and "selfessly" promoting the common good while ruling and lording over the rest of society. In short, doing well by doing good. To the new breed of progressive and statist intellectuals in America, this was a heady vision indeed.

Richard T. Ely, virtually the founder of this new breed, was the leading progressive economist and also the teacher of most of the others. As an ardent postmillennialist pietist, Ely was convinced that he was serving God and Christ as well. Like so many pietists, Ely was born (in 1854) of solid Yankee and old Puritan stock, again in the midst of the fanatical Burned-Over District of western New York. Ely's father, Ezra, was an extreme Sabbatarian, preventing his family from playing games or reading books on Sunday, and so ardent a prohibitionist that, even though an impoverished, marginal farmer, he refused to grow barley, a crop uniquely suitable to his soil, because it would have been used to make that monstrously sinful product, beer.[60] Having been graduated from Columbia College in 1876, Ely went to Germany and received his Ph.D. from Heidelberg in 1879. In several decades of teaching at Johns Hopkins and then at Wisconsin, the energetic and empire-building Ely became enormously influential in American thought and politics. At Johns Hopkins he turned out a gallery of influential students and statist disciples in all fields of the social sciences as well as economics. These disciples were headed by the prounion institutionalist economist John R. Commons, and included the social-control sociologists Edward Alsworth Ross and Albion W. Small; John H. Finlay, President of City College of New York; Dr. Albert Shaw, editor of the *Review of Reviews* and influential adviser and theoretician to Theodore Roosevelt; the municipal reformer Frederick C. Howe; and the historians Frederick Jackson Turner and J. Franklin Jameson. Newton D. Baker was trained by Ely at Hopkins, and Woodrow Wilson was also his student there, although there is no direct evidence of intellectual influence.

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In the mid-1880s Richard Ely founded the American Economic Association in a conscious attempt to commit the economics profession to statism as against the older laissez-faire economists grouped in the Political Economy Club. Ely continued as secretary-treasurer of the AEA for seven years, until his reformer allies decided to weaken the association's commitment to statism in order to induce the laissez-faire economists to join the organization. At that point. Ely, in high dudgeon, left the AEA.

At Wisconsin in 1892, Ely formed a new School of Economics, Political Science, and History, surrounded himself with former students, and gave birth to the Wisconsin Idea which, with the help of John Commons, succeeded in passing a host of progressive measures for government regulation in Wisconsin. Ely and the others formed an unofficial but powerful braintrust for the progressive regime of Wisconsin Governor Robert M. La Follette, who got his start in Wisconsin politics as an advocate of prohibition. Though never a classroom student of Ely's, La Follette always referred to Ely as his teacher and as the molder of the Wisconsin Idea. And Theodore Roosevelt once declared that Ely "first introduced me to radicalism in economics and then made me sane in my radicalism."[61]

Ely was also one of the most prominent postmillennialist intellectuals of the era. He fervently believed that the State is God's chosen instrument for reforming and Christianizing the social order so that eventually Jesus would arrive and put an end to history. The State, declared Ely, "is religious in its essence," and, furthermore, "God works through the State in carrying out His purposes more universally than through any other institution." The task of the church is to guide the State and utilize it in these needed reforms.[62]

An inveterate activist and organizer, Ely was prominent in the evangelical Chautauqua movement, and he founded there the "Christian Sociology" summer school, which infused the influential Chautauqua operation with the concepts and the personnel of the Social Gospel movement. Ely was a friend and close associate of Social Gospel leaders Revs. Washington Gladden, Walter Rauschenbusch, and Josiah Strong. With Strong and Commons, Ely organized the Institute of Christian Sociology.[63] Ely also founded and became the secretary of the Christian Social Union of the Episcopal Church, along with Christian Socialist W. D. P. Bliss.

All of these activities were infused with postmillennial statism. Thus, the Institute of Christian Sociology was pledged to present God's "kingdom as the complete ideal of human society to be realized on earth." Moreover,

> Ely viewed the state as the greatest redemptive force in society. . . . In Ely's eyes, government was the God-given instrument through which we had to work. Its preeminence as a divine instrument was based on the post-Reformation abolition of the division between the sacred and the secular and on the State's power to implement ethical solutions to public problems. The same identification of sacred and secular which took place among liberal clergy enabled Ely to both divinize the state and socialize Christianity: he thought of government as God's main instrument of redemption. . . .[64]

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When war came, Richard Ely was for some reason (perhaps because he was in his sixties) left out of the excitement of war work and economic planning in Washington. He bitterly regretted that "I have not had a more active part then I have had in this greatest war in the world's history."[65] But Ely made up for his lack as best he could; virtually from the start of the European war, he whooped it up for militarism, war, the "discipline" of conscription, and the suppression of dissent and "disloyalty" at home. A lifelong militarist, Ely had tried to volunteer for war service in the Spanish-American War, had called for the suppression of the Philippine insurrection, and was particularly eager for conscription and for forced labor for "loafers" during World War I. By 1915 Ely was agitating for immediate compulsory military service, and the following year he joined the ardently prowar and heavily big business-influenced National Security League, where he called for the liberation of the German people from "autocracy."[66] In advocating conscription, Ely was neatly able to combine moral, economic, and prohibitionist arguments for the draft: "The moral effect of taking boys off street corners and out of saloons and drilling them is excellent, and the economic effects are likewise beneficial."[67] Indeed, conscription for Ely served almost as a panacea for all ills. So enthusiastic was he about the World War I experience that Ely again prescribed his favorite cure-all to alleviate the 1929 depression. He proposed a permanent peacetime "industrial army" engaged in public works and manned by conscripting youth for strenuous physical labor. This conscription would instill into America's youth the essential "military ideals of hardihood and discipline," a discipline once provided by life on the farm but unavailable to the bulk of the populace now growing up in the effete cities. This small, standing conscript army could then speedily absorb the unemployed during depressions. Under the command of "an economic general staff," the industrial army would "go to work to relieve distress with all the vigor and resources of brain and brawn that we employed in the World War."[68]

Deprived of a position in Washington, Ely made the stamping out of "disloyalty" at home his major contribution to the war effort. He called for the total suspension of academic freedom for the duration. Any professor, he declared, who stated "opinions which hinder us in this awful struggle" should be "fired" if not indeed "shot." The particular focus of Ely's formidable energy was a zealous campaign to try to get his old ally in Wisconsin politics, Robert M. La Follette, expelled from the U.S. Senate for continuing to oppose America's participation in the war. Ely declared that his "blood boils" at La Follette's "treason" and attacks on war profiteering. Throwing himself into the battle, Ely founded and became president of the Madison chapter of the Wisconsin Loyalty Legion and mounted a campaign to expel La Follette.[69] The campaign was meant to mobilize the Wisconsin faculty and to support the ultrapatriotic and ultrahawkish activities of Theodore Roosevelt. Ely wrote to TR that "we must crush La Follettism." In his unremitting campaign against the Wisconsin Senator, Ely thundered that

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La Follette "has been of more help to the Kaiser than a quarter of a million troops."[70] "Empiricism" rampant.

The faculty of the University of Wisconsin was stung by charges throughout the state and the country that its failure to denounce La Follette was proof that the university—long affiliated with La Follette in state politics—supported his disloyal antiwar policies. Prodded by Ely, Commons, and others, the university's War Committee drew up and circulated a petition, signed by the university president, all the deans, and over 90 percent of the faculty, that provided one of the more striking examples in United States history of academic truckling to the State apparatus. None too subtly using the constitutional verbiage for treason, the petition protested "against those utterances and actions of Senator La Follette which have given aid and comfort to Germany and her allies in the present war; we deplore his failure loyally to support the government in the prosecution of the war."[70]

Behind the scenes, Ely tried his best to mobilize America's historians against La Follette, to demonstrate that he had given aid and comfort to the enemy. Ely was able to enlist the services of the National Board of Historical Service, the propaganda agency established by professional historians for the duration of the war, and of the government's own propaganda arm, the Committee on Public Information. Warning that the effort must remain secret, Ely mobilized historians under the aegis of these organizations to research German and Austrian newspapers and journals to try to build a record of La Follette's alleged influence, "indicating the encouragement he has given Germany." The historian E. Merton Coulter revealed the objective spirit animating these researches: "I understand it is to be an unbiased and candid account of the Senator's [La Follette's] course and its effect—but we all know it can lead but to one conclusion—something little short of treason."[71]

Professor Gruber well notes that this campaign to get La Follette was "a remarkable example of the uses of scholarship for espionage. It was a far cry from the disinterested search for truth for a group of professors to mobilize a secret research campaign to find ammunition to destroy the political career of a United States senator who did not share their view of the war."[72] In any event, no evidence was turned up, the movement failed, and the Wisconsin professoriat began to move away in distrust from the Loyalty Legion.[73]

After the menace of the Kaiser had been extirpated, the Armistice found Professor Ely, along with his compatriots in the National Security League, ready to segue into the next round of patriotic repression. During Ely's anti-La Follette research campaign he had urged investigation of "the kind of influence which he [La Follette] has exerted against our country in Russia." Ely pointed out that modern "democracy" requires a "high degree of conformity" and that therefore the "most serious menace" of Bolshevism, which Ely depicted as "social disease germs," must be fought "with repressive measures."

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By 1924, however, Richard T. Ely's career of repression was over, and what is more, in a rare instance of the workings of poetic justice, he was hoist with his own petard. In 1922 the much traduced Robert La Follette was reelected to the Senate and also swept the Progressives back into power in the state of Wisconsin. By 1924 the Progressives had gained control of the Board of Regents, and they moved to cut off the water of their former academic ally and empire-builder. Ely then felt it prudent to move out of Wisconsin together with his Institute, and while he lingered for some years at Northwestern, the heyday of Ely's fame and fortune was over.

VII. Economics in Service of the State: Government and Statistics

Statistics is a vital, though much underplayed, requisite of modern government. Government could not even presume to control, regulate, or plan any portion of the economy without the service of its statistical bureaus and agencies. Deprive government of its statistics and it would be a blind and helpless giant, with no idea whatever of what to do or where to do it. It might be replied that business firms, too, need statistics in order to function. But business needs for statistics are far less in quantity and also different in quality. Business may need statistics in its own micro area of the economy, but only on its prices and costs; it has little need for broad collections of data or for sweeping, holistic aggregates. Business could perhaps rely on its own privately collected and unshared data. Furthermore, much entrepreneurial knowledge is qualitative, not enshrined in quantitative data, and of a particular time, area, and location. But government bureaucracy could do nothing if forced to be confined to qualitative data. Deprived of profit and loss tests for efficiency, or of the need to serve consumers efficiently, conscripting both capital and operating costs from taxpayers, and forced to abide by fixed, bureaucratic rules, modern government shorn of masses of statistics could do virtually nothing.[74]

Hence the enormous importance of World War I, not only in providing the power and the precedent for a collectivized economy, but also in greatly accelerating the advent of statisticians and statistical agencies of government, many of which (and who) remained in government, ready for the next leap forward of power.

Richard T. Ely, of course, championed the new empirical "look and see" approach, with the aim of fact-gathering to "mold the forces at work in society and to improve existing conditions."[75] More importantly, one of the leading authorities on the growth of government expenditure has linked it with statistics and empirical data: "Advance in economic science and statistics . . . strengthened belief in the possibilities of dealing with social problems by collective action. It made for increase in the statistical and other fact-finding activities of

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government.''[76] As early as 1863, Samuel B. Ruggles, American delegate to the International Statistical Congress in Berlin, proclaimed that ''statistics are the very eyes of the statesman, enabling him to survey and scan with clear and comprehensive vision the whole structure and economy of the body politic.''[77]

Conversely, this means that stripped of these means of vision, the statesman would no longer be able to meddle, control and plan.

Moreover, government statistics are clearly needed for specific types of intervention. Government could not intervene to alleviate unemployment unless statistics of unemployment were collected—and so the impetus for such collection. Carroll D. Wright, one of the first Commissioners of Labor in the United States, was greatly influenced by the famous statistician and German Historical School member, Ernst Engel, head of the Royal Statistical Bureau of Prussia. Wright sought the collection of unemployment statistics for that reason, and in general, for ''the amelioration of unfortunate industrial and social relations.'' Henry Carter Adams, a former student of Engel's, and, like Ely, a statist and progressive ''new economist,'' established the Statistical Bureau of the Interstate Commerce Commission, believing that ''ever increasing statistical activity by the government was essential—for the sake of controlling naturally monopolistic industries. . . .'' And Professor Irving Fisher of Yale, eager for government to stabilize the price level, conceded that he wrote *The Making of Index Numbers* to solve the problem of the unreliability of index numbers. ''Until this difficulty could be met, stabilization could scarcely be expected to become a reality.''

Carroll Wright was a Bostonian and a progressive reformer. Henry Carter Adams, the son of a New England pietist Congregationalist preacher on missionary duty in Iowa, studied for the ministry at his father's alma mater, Andover Theological Seminary, but soon abandoned this path. Adams devised the accounting system of the Statistical Bureau of the ICC. This system ''served as a model for the regulation of public utilities here and throughout the world.''[78]

Irving Fisher was the son of a Rhode Island Congregationalist pietist preacher, and his parents were both of old Yankee stock, his mother a strict Sabbatarian. As befitted what his son and biographer called his ''crusading spirit,'' Fisher was an inveterate reformer, urging the imposition of numerous progressive measures including Esperanto, simplified spelling, and calendar reform. He was particularly enthusiastic about purging the world of ''such iniquities of civilization as alcohol, tea, coffee, tobacco, refined sugar, and bleached white flour. . . .''[79] During the 1920s Fisher was the leading prophet of that so-called New Era in economics and in society. He wrote three books during the 1920s praising the noble experiment of prohibition, and he lauded Governor Benjamin Strong and the Federal Reserve System for following his advice and expanding money and credit so as to keep the wholesale price level virtually constant. Because of the Fed's success in imposing Fisherine price stabilization, Fisher was so sure that there *could be* no depression that as late as 1930 he wrote a book claiming

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that there was and could be no stock crash and that stock prices would quickly rebound. Throughout the 1920s Fisher insisted that since wholesale prices remained constant, there was nothing amiss about the wild boom in stocks. Meanwhile he put his theories into practice by heavily investing his heiress wife's considerable fortune in the stock market. After the crash he frittered away his sister-in-law's money when his wife's fortune was depleted, at the same time calling frantically on the federal government to inflate money and credit and to reinflate stock prices to their 1929 levels. Despite his dissipation of two family fortunes, Fisher managed to blame almost everyone except himself for the debacle.[80]

As we shall see, in view of the importance of Wesley Clair Mitchell in the burgeoning of government statistics in World War I, Mitchell's view on statistics are of particular importance.[81] Mitchell, an institutionalist and student of Thorstein Veblen, was one of the prime founders of modern statistical inquiry in economics and clearly aspired to lay the basis for "scientific" government planning. As Professor Dorfman, friend and student of Mitchell's, put it:

> "clearly the type of social invention most needed today is one that offers definite techniques through which the social system can be controlled and operated to the optimum advantage of its members." (Quote from Mitchell.) To this end he constantly sought to extend, improve and refine the gathering and compilation of data. . . . Mitchell believed that business-cycle analysis . . . might indicate the means to the achievement of orderly social control of business activity.[82]

Or, as Mitchell's wife and collaborator stated in her memoirs:

> . . . he [Mitchell] envisaged the great contribution that government could make to the understanding of economic and social problems if the statistical data gathered independently by various Federal agencies were systematized and planned so that the interrelationships among them could be studied. The idea of developing social statistics, *not merely as a record but as a basis for planning,* emerged early in his own work.[83]

Particularly important in the expansion of statistics in World War I was the growing insistence, by progressive intellectuals and corporate liberal businessmen alike, that democratic decision-making must be increasingly replaced by the administrative and technocratic. Democratic or legislative decisions were messy, "inefficient," and might lead to a significant curbing of statism, as had happened in the heyday of the Democratic party during the nineteenth century. But if decisions were largely administrative and technocratic, the burgeoning of state power could continue unchecked. The collapse of the laissez-faire creed of the Democrats in 1896 left a power vacuum in government that administrative and corporatist types were eager to fill. Increasingly, then, such powerful corporatist big business groups as the National Civic Federation disseminated the idea that governmental decisions should be in the hands of the efficient technician, the allegedly value-

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free expert. In short, government, in virtually all of its aspects, should be "taken out of politics." And statistical research with its aura of empiricism, quantitative precision, and nonpolitical value-freedom, was in the forefront of such emphasis. In the municipalities, an increasingly powerful progressive reform movement shifted decisions from elections in neighborhood wards to citywide professional managers and school superintendants. As a corollary, political power was increasingly shifted from working class and ethnic German Lutheran and Catholic wards to upper-class pietist business groups.[84]

By the time World War I arrived in Europe, a coalition of progressive intellectuals and corporatist business men was ready to go national in sponsoring allegedly objective statistical research institutes and think tanks. Their views have been aptly summed up by David Eakins:

> The conclusion being drawn by these people by 1915 was that fact-finding and policymaking had to be isolated from class struggle and freed from political pressure groups. The reforms that would lead to industrial peace and social order, these experts were coming to believe, could only be derived from data determined by objective fact-finders (such as themselves) and under the auspices of sober and respectable organizations (such as only they could construct). The capitalist system could be improved only by a single-minded reliance upon experts detached from the hurly-burly of democratic policymaking. The emphasis was upon efficiency—and democratic policymaking was inefficient. An approach to the making of national economic and social policy outside traditional democratic political processes was thus emerging before the United States formally entered World War I.[85]

Several corporatist businessmen and intellectuals moved at about the same time toward founding such statistical research institutes. In 1906–07, Jerome D. Greene, secretary of the Harvard University Corporation, helped found an elite Tuesday Evening Club at Harvard to explore important issues in economics and the social sciences. In 1910 Greene rose to an even more powerful post as general manager of the new Rockefeller Institute for Medical Research, and three years later Greene became secretary and CEO of the powerful philanthropic organization, the Rockefeller Foundation. Greene immediately began to move toward establishing a Rockefeller-funded institute for economic research, and in March 1914 he called an exploratory group together in New York, chaired by his friend and mentor in economics, the first Dean of the Harvard Graduate School of Business, Edwin F. Gay. The developing idea was that Gay would become head of a new, "scientific" and "impartial" organization, The Institute of Economic Research, which would gather statistical facts, and that Wesley Mitchell would be its director.[86]

Opposing advisers to John D. Rockefeller, Jr., won out over Greene, however, and the Institute plan was scuttled.[87] Mitchell and Gay pressed on, with the lead now taken by Mitchell's long-time friend, chief statistician and vice-president of A.T. & T., Malcolm C. Rorty. Rorty lined up support for the idea from a number of progressive statisticians and businessmen, including Chicago publisher

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of business books and magazines, Arch W. Shaw; E. H. Goodwin of the U.S. Chamber of Commerce; Magnus Alexander, statistician and assistant to the president of General Electric, like A.T. & T. a Morgan-oriented concern; John R. Commons, economist and aide-de-camp to Richard T. Ely at Wisconsin; and Nahum I. Stone, statistician, former Marxist, a leader in the "scientific management" movement, and labor manager for the Hickey Freeman clothing company. This group was in the process of forming a "Committee on National Income" when the United States entered the war, and they were forced to shelve their plans temporarily.[88] After the war, however, the group set up the National Bureau of Economic Research, in 1920.[89]

While the National Bureau was not to take final shape until after the war, another organization, created on similar lines, successfully won Greene's and Rockefeller's support. In 1916 they were persuaded by Raymond B. Fosdick to found the Institute for Government Research (IGR).[90] The IGR was slightly different in focus from the National Bureau group, as it grew directly out of municipal progressive reform and the political science profession. One of the important devices used by the municipal reformers was the private bureau of municipal research, which tried to seize decision-making from allegedly "corrupt" democratic bodies on behalf of efficient, nonpartisan organizations headed by progressive technocrats and social scientists. In 1910 President William Howard Taft, intrigued with the potential for centralizing power in a chief executive inherent in the idea of the executive budget, appointed the "father of the budget idea," the political scientist Frederick D. Cleveland, as head of a Commission on Economy and Efficiency. Cleveland was the director of the New York Bureau of Municipal Research. The Cleveland Commission also included political scientist and municipal reformer Frank Goodnow, professor of public law at Columbia University, first president of the American Political Science Association and president of Johns Hopkins; and William Franklin Willoughby, former student of Ely, Assistant Director of the Bureau of Census, and later President of the American Association for Labor Legislation.[91] The Cleveland Commission was delighted to tell President Taft precisely what he wanted to hear. The Commission recommended sweeping administrative changes that would provide a Bureau of Central Administrative Control to form a "consolidated information and statistical arm of the entire national government." And at the heart of the new Bureau would be the Budget Division, which was to develop, at the behest of the president, and then present "an annual program of business for the Federal Government to be financed by Congress."[92]

When Congress balked at the Cleveland Commission's recommendations, the disgruntled technocrats decided to establish an Institute for Government Research in Washington to battle for these and similar reforms. With funding secured from the Rockefeller Foundation, the IGR was chaired by Goodnow, with Willoughby as its director.[93] Soon Robert S. Brookings assumed responsibility for the financing.

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When America entered the war, present and future NBER and IGR leaders were all over Washington, key figures and statisticians in the collectivized war economy.

By far the most powerful of the growing number of economists and statisticians involved in World War I was Edwin F. Gay. Arch W. Shaw, an enthusiast for rigid wartime planning of economic resources, was made head of the new Commercial Economy Board by the Council for National Defense as soon as America entered the war.[94] Shaw, who had taught at and served on the administrative board of Harvard Business School, staffed the Board with Harvard Business people; the secretary was Harvard economist Melvin T. Copeland, and other members included Dean Gay. The Board, which later became the powerful Conservation Division of the War Industries Board, focused on restricting competition in industry by eliminating the number and variety of products and by imposing compulsory uniformity, all in the name of "conservation" of resources to aid the war effort. For example, garment firms had complained loudly of severe competition because of the number and variety of styles, and so Gay urged the garment firms to form a trade association to work with the government in curbing the surfeit of competition. Gay also tried to organize the bakers so that they would not follow the usual custom of taking back stale and unsold bread from retail outlets. By the end of 1917, Gay was tired of using voluntary persuasion and was urging the government to use compulsory measures.

Gay's major power came in early 1918 when the Shipping Board, which had officially nationalized all ocean shipping, determined to restrict drastically the use of ships for civilian trade and to use the bulk of shipping for transport of American troops to France. Appointed in early January 1918 as merely a "special expert" by the Shipping Board, Gay in a brief time became the key figure in redirecting shipping from civilian to military use. Soon Edwin Gay had become a member of the War Trade Board and head of its statistical department, which issued restrictive licenses for permitted imports; head of the statistical department of the Shipping Board; representative of the Shipping Board on the War Trade Board; head of the statistical committee of the Department of Labor; head of the Division of Planning and Statistics of the War Industries Board (WIB); and, above all, head of the new Central Bureau of Planning and Statistics. The Central Bureau was organized in the fall of 1918, when President Wilson asked WIB chairman Bernard Baruch to produce a monthly survey of all the government's war activities. This "conspectus" evolved into the Central Bureau, responsible directly to the President. The importance of the Bureau is noted by a recent historian:

> The new Bureau represented the "peak" statistical division of the mobilization, becoming its "seer and prophet" for the duration, coordinating over a thousand employees engaged in research and, as the agency responsible for giving the president a concise picture of the entire economy, becoming the closest approximation to a "central statistical commission." During the

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> latter stages of the war it set up a clearinghouse of statistical work, organized liaisons with the statistical staff of all the war boards, and centralized the data production process for the entire war bureaucracy. By the war's end, Wesley Mitchell recalled, "we were in a fair way to develop for the first time a systematic organization of federal statistics."[95]

Within a year, Edwin Gay had risen from a special expert to the unquestioned czar of a giant network of federal statistical agencies, with over a thousand researchers and statisticians working under his direct control.

It is no wonder then that Gay, instead of being enthusiastic about the American victory he had worked so hard to secure, saw the Armistice as "almost . . . a personal blow" that plunged him "into the slough of despond." All of his empire of statistics and control had just been coming together and developing into a mighty machine when suddenly "came that wretched Armistice."[96] Truly a tragedy of peace.

Gay tried valiantly to keep the war machinery going, continually complaining because many of his aides were leaving and bitterly denouncing the "hungry pack" who, for some odd reason, were clamoring for an immediate end to all wartime controls, including those closest to his heart, foreign trade and shipping. But one by one, despite the best efforts of Baruch and many of the wartime planners, the WIB and other war agencies disappeared.[97] For a while, Gay pinned his hopes on his Central Bureau of Planning and Statistics (CBPS), which, in a fierce bout of bureaucratic infighting, he attempted to make the key economic and statistical group advising the American negotiators at the Versailles peace conference, thereby displacing the team of historians and social scientists assembled by Colonel House in the Inquiry. Despite an official victory, and an eight volume report of the CBPS delivered to Versailles by the head of CBPS European team, John Foster Dulles of the War Trade Board, the bureau had little influence over the final treaty.[98]

Peace having finally and irrevocably arrived, Edwin Gay, backed by Mitchell, tried his best to have the CBPS kept as a permanent, peacetime organization. Gay argued that the agency, with himself of course remaining as its head, could provide continuing data to the League of Nations, and above all could serve as the president's own eyes and ears and mold the sort of executive budget envisioned by the old Taft Commission. CBPS staff member and Harvard economist Edmund E. Day contributed a memorandum outlining specific tasks for the bureau to aid in demobilization and reconstruction, as well as rationale for the bureau becoming a permanent part of government. One thing it could do was to make a "continuing canvass" of business conditions in the United States. As Gay put it to President Wilson, using a favorite organicist analogy, a permanent Board would serve "as a nervous system to the vast and complex organization of the government, furnishing to the controlling brain [the President] the information necessary for directing the efficient operation of the various members."[99] Although

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the President was "very cordial" to Gay's plan, Congress refused to agree, and on June 30, 1919 the Central Bureau of Planning and Statistics was finally terminated, along with the War Trade Board. Edwin Gay would now have to seek employment in, if not the private, at least the quasi-independent, sector.

But Gay and Mitchell were not to be denied. Nor would the Brookings-Willoughby group. Their objective would be met more gradually and by slightly different means. Gay became editor of the *New York Evening Post* under the aegis of its new owner and Gay's friend, J. P. Morgan partner Thomas W. Lamont. Gay also helped to form and become first president of the National Bureau of Economic Research in 1920, with Wesley C. Mitchell as research director. The Institute for Government Research achieved its major objective, establishing a Budget Bureau in the Treasury Department in 1921, with the director of the IGR, William F. Willoughby, helping to draft the bill that established the bureau.[100] The IGR people soon expanded their role to include economics, establishing an Institute of Economics headed by Robert Brookings and Arthur T. Hadley of Yale, with economist Harold G. Moulton as director.[101] The Institute, funded by the Carnegie Corporation, would be later merged, along with the IGR, into the Brookings Institution. Edwin Gay also moved into the foreign policy field by becoming secretary-treasurer and head of the Research Committee of the new and extremely influential organization, the Council on Foreign Relations (CFR).[102]

And finally, in the field of government statistics, Gay and Mitchell found a more gradual but longer-range route to power via collaboration with Herbert Hoover, soon to be Secretary of Commerce. No sooner had Hoover assumed the post in early 1921 when he expanded the Advisory Committee on the Census to include Gay, Mitchell, and other economists and then launched the monthly *Survey of Current Business*. The *Survey* was designed to supplement the informational activities of cooperating trade associations and, by supplying business information, aid these associations in Hoover's aim of cartelizing their respective industries. Secrecy in business operations is a crucial weapon of competition, and conversely, publicity and sharing of information is an important tool of cartels in policing their members. The *Survey of Current Business* made available the current production, sales, and inventory data supplied by cooperating industries and technical journals. Hoover also hoped that by building on these services, eventually "the statistical program could provide the knowledge and foresight necessary to combat panic or speculative conditions, prevent the development of diseased industries, and guide decision-making so as to iron out rather than accentuate the business cycle."[103] In promoting his cartelization doctrine, Hoover met resistance both from some businessmen who resisted prying questionnaires and sharing competitive secrets and from the Justice Department. But, a formidable empire-builder, Herbert Hoover managed to grab statistical services from the Treasury Department and to establish a "waste elimination division" to organize businesses and trade associations to continue and expand the wartime

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"conservation" program of compulsory uniformity and restriction of the number and variety of competitive products. As assistant secretary to head up this program, Hoover secured engineer and publicist Frederick Feiker, an associate of Arch Shaw's business publication empire. Hoover also found a top assistant and lifelong disciple in Brigadier General Julius Klein, a protege of Edwin Gay's, who had headed the Latin American division of the Bureau of Foreign and Domestic Commerce. As the new head of the bureau, Klein organized seventeen new export commodity divisions—reminiscent of commodity sections during wartime collectivism—each with "experts" drawn from the respective industries and each organizing regular cooperation with parallel industrial advisory committees. And through it all Herbert Hoover made a series of well-publicized speeches during 1921, spelling out how a well-designed government trade program, as well as a program in the domestic economy, could act both as a stimulant to recovery and as a permanent "stabilizer," while avoiding such unfortunate measures as abolishing tariffs or cutting wage rates. The best weapon, both in foreign and domestic trade, was to "eliminate waste" by a "cooperative mobilization" of government and industry.[104]

A month after the Armistice, the American Economic Association and the American Statistical Association met jointly in Richmond, Virginia. The presidential addresses were delivered by men in the forefront of the exciting new world of government planning, aided by social science, that seemed to loom ahead. In his address to the American Statistical Association, Wesley Clair Mitchell proclaimed that the war had "led to the use of statistics, not only as a record of what had happened, but also as a vital factor in planning what should be done." As he had said in his final lecture in Columbia University the previous spring, the war had shown that when the community desires to attain a great goal "then within a short period far-reaching social changes can be achieved." "The need for scientific planning of social change," he added, "has never been greater, the chance of making those changes in an intelligent fashion . . . has never been so good." The peace will bring new problems, he opined, but "it seems impossible" that the various countries will "attempt to solve them without utilizing the same sort of centralized directing now employed to kill their enemies abroad for the new purpose of reconstructing their own life at home. . . ."

But the careful empiricist and statistician also provided a caveat. Broad social planning requires "a precise comprehension of social processes" and that can be provided only by the patient research of social science. As he had written to his wife eight years earlier, Mitchell stressed that what is needed for government intervention and planning is the application of the methods of physical science and industry, particularly precise quantitative research and measurement. In contrast to the quantitative physical sciences, Mitchell told the assembled statisticians, the social sciences are "immature, speculative, filled with controversy" and class struggle. But quantitative knowledge could replace such struggle and

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conflict by commonly accepted precise knowledge, "objective" knowledge "amenable to mathematical formulation" and "capable of forecasting group phenomena." A statistician, Mitchell opined, is "either right or wrong," and it is easy to demonstrate which. As a result of precise knowledge of facts, Mitchell envisioned, we can achieve "intelligent experimenting and detailed planning rather than . . . agitation and class struggle."

To achieve these vital goals none other than economists and statisticians would provide the crucial element, for we would have to be "relying more and more on trained people to plan changes for us, to follow them up, to suggest alterations."[105]

In a similar vein, the assembled economists in 1918 were regaled with the visionary presidential address of Yale economist Irving Fisher. Fisher looked forward to an economic "world reconstruction" that would provide glorious opportunities for economists to satisfy their constructive impulses. A class struggle, Fisher noted, would surely be continuing over distribution of the nation's wealth. But by devising a mechanism of "readjustment," the nation's economists could occupy an enviable role as the independent and impartial arbiters of the class struggle, these disinterested social scientists making the crucial decisions for the public good.

In short, both Mitchell and Fisher were, subtly and perhaps half-consciously, advancing the case for a postwar world in which their own allegedly impartial and scientific professions could levitate above the narrow struggles of classes for the social product, and thus emerge as a commonly accepted, "objective" new ruling class, a twentieth-century version of the philosopher-kings.

It might not be amiss to see how these social scientists, prominent in their own fields and spokesmen in different ways for the New Era of the 1920s, fared in their disquisitions and guidance for the society and the economy. Irving Fisher, as we have seen, wrote several works celebrating the alleged success of prohibition, and insisted even after 1929, that since the price level had been kept stable, there could be no depression or stock market crash. For his part, Mitchell culminated a decade of snug alliance with Herbert Hoover by directing, along with Gay and the National Bureau, a massive and hastily written work on the American economy. Published in 1929 on the accession of Hoover to the presidency, with all the resources of scientific and quantitative economics and statistics brought to bear, there is not so much as a hint in *Recent Economic Changes in the United States* that there might be a crash and depression in the offing.

The *Recent Economic Changes* study was originated and organized by Herbert Hoover, and it was Hoover who secured the financing from the Carnegie Corporation. The object was to celebrate the years of prosperity presumably produced by Secretary of Commerce Hoover's corporatist planning and to find out how the possibly future President Hoover could maintain that prosperity by absorbing its lessons and making them a permanent part of the American political struc-

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ture. The volume duly declared that to maintain the current prosperity, economists, statisticians, engineers, and enlightened managers would have to work out "a technique of balance" to be installed in the economy.

Recent Economic Changes, that monument to "scientific" and political folly, went through three quick printings and was widely publicized and warmly received on all sides.[106] Edward Eyre Hunt, Hoover's long time aide in organizing his planning activities, was so enthusiastic that he continued celebrating the book and its paean to American prosperity throughout 1929 and 1930.[107]

It is appropriate to end our section on government and statistics by noting an unsophisticated yet perceptive cry from the heart. In 1945 the Bureau of Labor Statistics approached Congress for yet another in a long line of increases in appropriations for government statistics. In the process of questioning Dr. A. Ford Hinrichs, head of the BLS, Representative Frank B. Keefe, a conservative Republican Congressman from Oshkosh, Wisconsin, put an eternal question that has not yet been fully and satisfactorily answered:

> There is no doubt but what it would be nice to have a whole lot of statistics. . . . I am just wondering whether we are not embarking on a program that is dangerous when we keep adding and adding and adding to this thing. . . .
>
> We have been planning and getting statistics ever since 1932 to try to meet a situation that was domestic in character, but were never able to even meet that question. . . . Now we are involved in an international question. . . . It looks to me as though we spend a tremendous amount of time with graphs and charts and statistics and planning. What my people are interested in is what is it all about? Where are we going, and where are you going?[108]

Notes

1. The title of this paper is borrowed from the pioneering last chapter of James Weinstein's excellent work, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968). The last chapter is entitled, "War as Fulfillment."
2. Robert Higgs, *Crisis and Leviathan* (New York: Oxford University Press, 1987), pp. 123–158. For my own account of the collectivized war economy of World War I, see Murray N. Rothbard, "War Collectivism in World War I", in R. Radosh and M. Rothbard, eds., *A New History of Leviathan: Essays on the Rise of the American Corporate State* (New York: Dutton, 1972), pp. 66–110.
3. F. A. Hayek, "The Intellectuals and Socialism," in *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), pp. 178ff.
4. On the conscription movement, see in particular Michael Pearlman, *To Make Democracy Safe for America: Patricians and Preparedness in the Progressive Era* (Urbana: University of Illinois Press, 1984). See also John W. Chambers II, "Conscripting for Colossus: The Adoption of the Draft in the United States in World War I," Ph.D. diss., Columbia University, 1973; John Patrick Finnegan, *Against the Specter of a Dragon: the Campaign for American Military Preparedness, 1914–1917* (Westport, Conn. Greenwood Press, 1974); and John Garry Clifford, *The Citizen Soldiers: The Plattsburg Training Camp Movement* (Lexington: University Press of Kentucky, 1972).

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5. On ministers and the war, see Ray H. Abrams, *Preachers Present Arms* (New York: Round Table Press, 1933). On the mobilization of science, see David F. Noble, *America By Design: Science, Technology and the Rise of Corporate Capitalism* (New York: Oxford University Press, 1977), and Ronald C. Tobey, *The American Ideology of National Science, 1919–1930* (Pittsburgh: University of Pittsburgh Press, 1971).
6. Cited in Gerald Edward Markowitz, "Progressive Imperialism: Consensus and Conflict in the Progressive Movement on Foreign Policy, 1898–1917," Ph.D. diss., University of Wisconsin, 1971, p. 375, an unfortunately neglected work on a highly important topic.
7. Hence the famous imprecation hurled at the end of the 1884 campaign that brought the Democrats into the presidency for the first time since the Civil War, that the Democratic Party was the party of "Rum, Romanism and Rebellion." In that one phrase, the New York Protestant minister was able to sum up the political concerns of the pietist movement.
8. For an introduction to the growing literature of "ethnoreligious" political history in the United States, see Paul Kleppner, *The Cross of Culture* (New York: the Free Press, 1970); and idem, *The Third Electoral System, 1853–1892* (Chapel Hill, N.C.: University of North Carolina Press, 1979). For the latest research on the formation of the Republican Party as a pietist party, reflecting the interconnected triad of pietist concerns—antislavery, prohibition, and anti-Catholicism—see William E. Gienapp, "Nativism and the Creation of a Republican Majority in the North before the Civil War," *Journal of American History* 72 (December 1985): 529–559.
9. German Lutherans were largely "high" or liturgical and confessional Lutherans who placed emphasis on the Church and its creed or sacraments rather than on a pietist, "born-again," emotional conversion experience. Scandinavian-Americans, on the other hand, were mainly pietist Lutherans.
10. Orthodox Augustinian Christianity, as followed by the liturgicals, is "a-millennialist", i.e., it believes that the "millennium" is simply a metaphor for the emergence of the Christian Church and that Jesus will return without human aid and at his own unspecified time. Modern "fundamentalists," as they have been called since the early years of the twentieth century, are "premillennialists," i.e., they believe that Jesus will return to usher in a thousand years of the Kingdom of God on Earth, a time marked by various "tribulations" and by Armageddon, until history is finally ended. Premillennialists, or "millennarians," do not have the statist drive of the postmillennialists; instead, they tend to focus on predictions and signs of Armageddon and of Jesus' advent.
11. James H. Timberlake, *Prohibition and the Progressive Movement, 1900–1920* (New York: Atheneum, 1970), pp. 7–8.
12. Quoted in Timberlake, *Prohibition*, p. 33.
13. The Progressive Party convention was a mighty fusion of all the major trends in the progressive movement: statist economists, technocrats, social engineers, social workers, professional pietists, and partners of J. P. Morgan & Co. Social Gospel leaders Lyman Abbott, the Rev. R. Heber Newton and the Rev. Washington Gladden, were leading Progressive Party delegates. The Progressive Party proclaimed itself as the "recrudescence of the religious spirit in American political life." Theodore Roosevelt's acceptance speech was significantly entitled "A Confession of Faith," and his words were punctuated by "amens" and by a continual singing of pietist Christian hymns by the assembled delegates. They sang "Onward Christian Soldiers," "The Battle Hymn of the Republic," and especially the revivalist hymn, "Follow, Follow, We Will Follow Jesus," with the word "Roosevelt" replacing "Jesus" at every turn. The horrified *New York Times* summed up the unusual experience by calling the Progressive grouping "a convention of fanatics." And it added, "It was not a convention at all. It was an assemblage of religious enthusiasts. It was such a convention as Peter the Hermit held. It was a Methodist camp following done over into political terms." Cited in John Allen Gable, *The Bull Moose Years: Theodore Roosevelt and the Progressive Party* (Port Washington, N.Y.: Kennikat Press, 1978), p. 75.
14. Timberlake, *Prohibition*, p. 24.

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15. Quoted in Timberlake, *Prohibition,* p. 27. Italics in the article. Or, as the Rev. Stelzle put it, in *Why Prohibition!,* "There is no such thing as an absolute individual right to do any particular thing, or to eat or drink any particular thing, or to enjoy the association of one's own family, or even to live, if that thing is in conflict with the law of public necessity." Quoted in David E. Kyvig, *Repealing National Prohibition* (Chicago: University of Chicago Press, 1979), p. 9.
16. Timberlake, *Prohibition,* pp. 37–38.
17. See David Burner, *Herbert Hoover: A Public Life* (New York: Alfred A. Knopf, 1979), p. 107.
18. James A. Burran, "Prohibition in New Mexico, 1917," *New Mexico Historical Quarterly* 48 (April 1973): 140–141. Mrs. Lindsey of course showed no concern whatever for the German, allied, and neutral countries of Europe being subjected to starvation by the British naval blockade.

    The only areas of New Mexico that resisted the prohibition crusade in the referendum in the November 1917 elections were the heavily Hispanic-Catholic districts.
19. Timberlake, *Prohibition,* p. 179.
20. Quoted in Timberlake, *Prohibition,* pp. 180–181.
21. Quoted in Alan P. Grimes, *The Puritan Ethic and Woman Suffrage* (New York: Oxford University Press, 1967), p. 78.
22. Grimes, *Puritan Ethic,* p. 116.
23. Ida Clyde Clarke, *American Women and the World War* (New York: D. Appleton and Co., 1918), p. 19.
24. Clarke, *American Women,* p. 27.
25. Ibid., p. 31. Actually Mrs. Tarbell's muckraking activities were pretty much confined to Rockefeller and Standard Oil. She was highly favorable to business leaders in the Morgan ambit, as witness her laudatory biographies of Judge Elbert H. Gary, of U.S. Steel (1925) and Owen D. Young, of General Electric (1932).
26. Ibid., p. 277, pp. 275–279, p. 58.
27. Ibid., p. 183.
28. Ibid., p. 103.
29. Ibid., pp. 104–105.
30. Ibid., p. 101.
31. Ibid., p. 129. Margaret Dreier Robins and her husband Raymond were virtually a paradigmatic progressive couple. Raymond was a Florida-born wanderer and successful gold prospector who underwent a mystical conversion experience in the Alaska wilds and became a pietist preacher. He moved to Chicago, where he became a leader in Chicago settlement house work and municipal reform. Margaret Dreier and her sister Mary were daughters of a wealthy and socially prominent New York family who worked for and financed the emergent National Women's Trade Union League. Margaret married Raymond Robins in 1905 and moved to Chicago, soon becoming longtime president of the league. In Chicago, the Robinses led and organized progressive political causes for over two decades, becoming top leaders of the Progressive Party from 1912 to 1916. During the war, Raymond Robins engaged in considerable diplomatic activity as head of a Red Cross mission to Russia. On the Robinses, see Allen F. Davis, *Spearhead for Reform: the Social Settlements and the Progressive Movement, 1890–1914* (New York: Oxford University Press, 1967).
32. For more on women's war work and woman suffrage, see the standard history of the suffrage movement, Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (New York: Atheneum, 1968), pp. 288–289. Interestingly, The National War Labor Board (NWLB) frankly adopted the concept of "equal pay for equal work" in order to limit the employment of women workers by imposing higher costs on the employer. The "only check," affirmed the NWLB, on excessive employment of women "is to make it no more profitable to employ women than men." Quoted in Valerie J. Conner, "'The Mothers of the Race' in World War I: The National War Labor Board and Women in Industry," *Labor History* 21 (Winter 1979–80): 34.

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33. See Raymond B. Fosdick, *Chronicle of a Generation: An Autobiography* (New York: Harper & Bros., 1958), p. 133. Also see Peter Collier and David Horowitz, *The Rockefellers: An American Dynasty* (New York: New American Library, 1976), pp. 103–105. Fosdick was particularly appalled that American patrolmen on street duty actually smoked cigars! Fosdick, *Chronicle*, p. 135.
34. The American Social Hygiene Association, with its influential journal *Social Hygiene*, was the major organization in what was known as the "purity crusade." The association was launched when the New York physician Dr. Prince A. Morrow, inspired by the agitation against venereal disease and in favor of the continence urged by the French syphilographer, Jean-Alfred Fournier, formed in 1905 the American Society for Sanitary and Moral Prophylaxis (ASSMP). Soon, the terms proposed by the Chicago branch of ASSMP, "social hygiene" and "sex hygiene," became widely used for their medical and scientific patina, and in 1910 ASSMP changed its name to the American Federation for Sex Hygiene (AFSH). Finally, in late 1913, AFSH, an organization of physicians, combined with the National Vigilance Association (formerly the American Purity Alliance), a group of clergymen and social workers, to form the all-embracing American Social Hygiene Association (ASHA).

    In this social hygiene movement, the moral and medical went hand in hand. Thus Dr. Morrow welcomed the new knowledge about venereal disease because it demonstrated that "punishment for sexual sin" no longer had to be "reserved for the hereafter."

    The first president of ASHA was the president of Harvard University, Charles W. Eliot. In his address to the first meeting, Eliot made clear that total abstinence from alcohol, tobacco, and even spices was part and parcel of the antiprostitution and purity crusade.

    On physicians, the purity crusade, and the formation of ASHA, see Ronald Hamowy, "Medicine and the Crimination of Sin: 'Self-Abuse' in 19th Century America," *The Journal of Libertarian Studies* 1 (Summer 1972): 247–259; James Wunsch, "Prostitution and Public Policy: From Regulation to Suppression, 1858–1920," Ph.D. diss., University of Chicago, 1976; and Roland R. Wagner, "Virtue Against Vice: A Study of Moral Reformers and Prostitution in the Progressive Era," Ph.D. diss., University of Wisconsin, 1971. On Morrow, also see John C. Burnham, "The Progressive Era Revolution in American Attitudes Toward Sex," *Journal of American History* 59 (March 1973): 899; and Paul Boyer, *Urban Masses and Moral Order in America, 1820–1920* (Cambridge: Harvard University Press, 1978), p. 201. Also see Burnham, "Medical Specialists and Movements Toward Social Control in the Progressive Era: Three Examples," in J. Israel, ed., *Building the Organizational Society: Essays in Associational Activities in Modern America* (New York: Free Press, 1972), pp. 24–26.
35. In Daniel R. Beaver, *Newton D. Baker and the American War Effort 1917–1919* (Lincoln, Nebr.: University of Nebraska Press, 1966), p. 222. Also see ibid., pp. 221–224; and C. H. Cramer, *Newton D. Baker: A. Biography* (Cleveland: World Publishing Co., 1961), pp. 99–102.
36. Fosdick, *Chronicle*, pp. 145–147. While prostitution was indeed banned in Storyville after 1917, Storyville, contrary to legend, never "closed", the saloons and dance halls remained open, and contrary to orthodox accounts, jazz was never really shut down in Storyville or New Orleans, and it was therefore never forced up river. For a revisionist view of the impact of the closure of Storyville on the history of jazz, see Tom Bethell, *George Lewis: A Jazzman from New Orleans* (Berkeley: University of California Press, 1977), pp. 6–7; and Al Rose, *Storyville, New Orleans* (Montgomery, Ala.: University of Alabama Press, 1974). Also, on later Storyville, see Boyer, *Urban Masses*, p. 218.
37. See Hamowy, "Crimination of Sin," p. 226 *n*. The quote from Clemenceau is in Fosdick, *Chronicle*, p. 171. Newton Baker's loyal biographer declared that Clemenceau, in this response, showed "his animal proclivities as the 'Tiger of France'". Cramer, *Newton Baker*, p. 101.
38. Clarke, *American Women*, pp. 90, 87, 93. In some cases, organized women took the offensive to help stamp out vice and liquor in their community. Thus in Texas in 1917 the Texas Women's Anti-Vice Committee led in the creation of a "White Zone" around all the military bases. By

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autumn the Committee expanded into the Texas Social Hygiene Association to coordinate the work of eradicating prostitution and saloons. San Antonio proved to be its biggest problem. Lewis L. Gould, *Progressives and Prohibitionists: Texas Democrats in the Wilson Era* (Austin: University of Texas Press, 1973), p. 227.

39. Davis, *Spearheads for Reform,* p. 225.
40. Fosdick, *Chronicle,* p. 144. After the War, Raymond Fosdick went on to fame and fortune, first as Under Secretary General of the League of Nations, and then for the rest of his life as a member of the small inner circle close to John D. Rockefeller, Jr. In that capacity, Fosdick rose to become head of the Rockefeller Foundation and Rockefeller's official biographer. Meanwhile, Fosdick's brother, Rev. Harry Emerson, became Rockefeller's hand-picked parish minister, first at Park Avenue Presbyterian Church and then at the new interdenominational Riverside Church, built with Rockefeller funds. Harry Emerson Fosdick was Rockefeller's principal aide in battling, within the Protestant Church, in favor of postmillennial, statist, "liberal" Protestantism and against the rising tide of premillennial Christianity, known as "fundamentalist" since the years before World War I. See Collier and Horowitz, *The Rockefellers,* pp. 140–142, 151–153.
41. Davis, *Spearheads for Reform,* p. 226; Timberlake, *Prohibition,* p. 66; Boyer, *Urban Masses,* p. 156.
42. Eleanor H. Woods, *Robert A. Woods; Champion of Democracy* (Boston: Houghton Mifflin, 1929), p. 316. Also see ibid., pp. 201–202, 250ff., 268ff.
43. Davis, *Spearheads for Reform,* p. 227.
44. H. L. Mencken, "Professor Veblen," in *A Mencken Chrestomathy* (New York: Alfred A. Knopf, 1949), p. 267.
45. Quoted in the important article by Jean B. Quandt, "Religion and Social Thought: The Secularization of Postmillennialism," *American Quarterly* 25 (October 1973): 404. Also see John Blewett, S.J., "Democracy as Religion: Unity in Human Relations," in Blewett, ed., *John Dewey: His Thought and Influence* (New York: Fordham University Press, 1960), pp. 33–58; and *John Dewey: The Early Works, 1882–1989,* eds., J. Boydston et al., (Carbondale: Southern Illinois University Press, 1969–71), vols. 2 and 3.
46. On the general secularization of postmillennial pietism after 1900, see Quandt, "Religion and Social Thought," pp. 390–409; and James H. Moorhead, "The Erosion of Postmillennialism in American Religious Thought, 1865–1925", *Church History* 53 (March 1984): 61–77.
47. Carol S. Gruber, *Mars and Minerva: World War I and the Uses of the Higher Learning in America* (Baton Rouge: Louisiana State University Press, 1975), p. 92.
48. Quoted in Gruber, *Mars and Minerva,* pp. 92–93. Also see William E. Leuchtenburg, "The New Deal and the Analogue of War," in J. Braeman, R. Bremner, and E. Walters, eds., *Change and Continuity in Twentieth-Century America* (New York: Harper & Row, 1966), p. 89. For similar reasons, Thorstein Veblen, prophet of the alleged dichotomy of production for profit vs. production for use, championed the war and began to come out openly for socialism in an article in the *New Republic* in 1918, later reprinted in his *The Vested Interests and the State of the Industrial Arts* (1919). See Charles Hirschfeld, "Nationalist Progressivism and World War I," *Mid-America* 45 (July 1963), p. 150. Also see David Riesman, *Thorstein Veblen: A Critical Interpretation* (New York: Charles Scribner's Sons, 1960), pp. 30–31.
49. Hirschfeld, "Nationalist Progressivism," p. 150.
50. Gruber, *Mars and Minerva,* p. 92.
51. Hirschfeld, "Nationalist Progressivism," p. 142. It is intriguing that for the *New Republic* intellectuals, actually existent private individuals are dismissed as "mechanical," whereas nonexistent entities such as "national and social" forces are hailed as being "organic."
52. Quoted in Hirschfeld, "Nationalist Progressivism," p. 147. A minority of prowar Socialists broke off from the antiwar Socialist Party to form the Social Democratic League, and to join a prowar front organized and financed by the Wilson administration, the American Alliance

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for Labor and Democracy. The prowar socialists welcomed the war as providing "startling progress in collectivism," and opined that after the war, the existent state socialism could be advanced toward "democratic collectivism." The prowar socialists included John Spargo, Algie Simons, W. J. Ghent, Robert R. LaMonte, Charles Edward Russell, J. G. Phelps Stokes, Upton Sinclair, and William English Walling. Walling so succumbed to war fever that he denounced the Socialist Party as a conscious tool of the Kaiser and advocated the suppression of freedom of speech for pacifists and for antiwar socialists. See Hirschfeld, "Nationalist Progressivism," p. 143. On Walling, see James Gilbert, *Designing the Industrial State: The Intellectual Pursuit of Collectivism in America, 1880–1940* (Chicago: Quadrangle Books, 1972), pp. 232–233. On the American Alliance for Labor and Democracy and its role in the war effort, see Ronald Radosh, *American Labor and United States Foreign Policy* (New York: Random House, 1969), pp. 58–71.

53. In fact, Jacob Lippmann was to contract cancer in 1925 and die two years later. Moreover, Lippmann, before and after Jacob's death, was supremely indifferent to his father. Ronald Steel, *Walter Lippmann and the American Century* (New York: Random House, 1981), p. 5, pp. 116–117. On Walter Lippmann's enthusiasm for conscription, at least for others, see Beaver, *Newton Baker*, pp. 26–27.
54. Hirschfeld, "Nationalist Progressivism," pp. 148–150. On the *New Republic* and the war, and particularly on John Dewey, also see Christopher Lasch, *The New Radicalism in America, 1889–1963: The Intellectual as A Social Type* (New York: Vintage Books, 1965), pp. 181–224, especially pp. 202–204. On the three *New Republic* editors, see Charles Forcey, *The Crossroads of Liberalism: Croly, Weyl, Lippmann and the Progressive Era, 1900–1925* (New York: Oxford University Press, 1961). Also see David W. Noble, "The New Republic and the Idea of Progress, 1914–1920," *Mississippi Valley Historical Review*, 38 (December 1951): 387–402. In a book titled *The End of the War* (1918), *New Republic* editor Walter Weyl assured his readers that "the new economic solidarity once gained, can never again be surrendered." Cited in Leuchtenburg, "New Deal," p. 90.
55. Rexford Guy Tugwell, "America's War-Time Socialism" *The Nation* (1927), pp. 364–365. Quoted in Leuchtenburg, "The New Deal." pp. 90–91.
56. In January 1927 Croly wrote a *New Republic* editorial, "An Apology for Fascism," endorsing an accompanying article, "Fascism for the Italians," written by the distinguished philosopher Horace M. Kallen, a disciple of John Dewey and an exponent of progressive pragmatism. Kallen praised Mussolini for his pragmatic approach, and in particular for the *elan vital* that Mussolini had infused into Italian life. True, Professor Kallen conceded, fascism is coercive, but surely this is only a temporary expedient. Noting fascism's excellent achievement in economics, education, and administrative reform, Kallen added that "in this respect the Fascist revolution is not unlike the Communist revolution. Each is the application by force . . . of an ideology to a condition. Each should have the freest opportunity once it has made a start. . . ." The accompanying *New Republic* editorial endorsed Kallen's thesis and added that "alien critics should beware of outlawing a political experiment which aroused in a whole nation an increased moral energy and dignified its activities by subordinating them to a deeply felt common purpose." *New Republic* 49 (January 12, 1927), pp. 207–213. Cited in John Patrick Diggins, "Mussolini's Italy: The View from America," Ph.D. diss., University of Southern California, 1964, pp. 214–217.
57. Born in Ireland, David Croly became a distinguished journalist in New York City and rose to the editorship of the *New York World.* Croly organized the first Positivist Circle in the United States and financed an American speaking tour for the Comtian Henry Edgar. The Positivist Circle met at Croly's home, and in 1871 David Croly published *A Positivist Primer.* When Herbert was born in 1869, he was consecrated by his father to the Goddess Humanity, the symbol of Comte's Religion of Humanity. See the illuminating recent biography of Herbert by David W. Levy, *Herbert Croly of the New Republic* (Princeton: Princeton University Press, 1985).

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58. See Jerry Israel, *Progressivism and the Open Door: America and China, 1905–1921* (Pittsburgh: University of Pittsburgh Press, 1971).
59. For a refreshingly acidulous portrayal of the actions of the historians in World War I, see C. Hartley Grattan, "The Historians Cut Loose," *American Mercury,* August 1927, reprinted in Harry Elmer Barnes, *In Quest of Truth and Justice,* 2nd ed. (Colorado Springs: Ralph Myles Publisher, 1972), pp. 142–164. A more extended account is George T. Blakey, *Historians on the Homefront: American Propagandists for the Great War* (Lexington: University Press of Kentucky, 1970). Gruber, *Mars and Minerva,* deals with academia and social scientists, but concentrates on historians. James R. Mock and Cedric Larson, *Words that Won the War* (Princeton University Press, 1939), presents the story of the "Creel Committee," the Committee on Public Information, the official propaganda ministry during the war.
60. See the useful biography of Ely, Benjamin G. Rader, *The Academic Mind and Reform: The Influence of Richard T. Ely in American Life* (Lexington: University Press of Kentucky, 1966).
61. Sidney Fine, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought 1865–1901* (Ann Arbor: University of Michigan Press, 1956), pp. 239–240.
62. Fine, *Laissez Faire,* pp. 180–181.
63. John Rogers Commons was of old Yankee stock, descendant of John Rogers, Puritan martyr in England, and born in the Yankee area of the Western Reserve in Ohio and reared in Indiana. His Vermont mother was a graduate of the hotbed of pietism, Oberlin College, and she sent John to Oberlin in the hopes that he would become a minister. While in college, Commons and his mother launched a prohibitionist publication at the request of the Anti-Saloon League. After graduation, Commons went to Johns Hopkins to study under Ely, but flunked out of graduate school. See John R. Commons, *Myself* (Madison, Wisc.: University of Wisconsin Press, 1964). Also see Joseph Dorfman, *The Economic Mind in American Civilization* (New York: Viking, 1949), vol. 3, 276–277; Mary O. Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905* (Lexington: University Press of Kentucky, 1975), pp. 198–204.
64. Quandt, "Religion and Social Thought," pp. 402–403. Ely did not expect the millennial Kingdom to be far off. He believed that it was the task of the universities and of the social sciences "to teach the complexities of the Christian duty of brotherhood" in order to arrive at the New Jerusalem "which we are all eagerly awaiting." The church's mission was to attack every evil institution, "until the earth becomes a new earth, and all its cities, cities of God."
65. Gruber, *Mars and Minerva,* p. 114.
66. See Rader, *Academic Mind,* pp. 181–191. On top big business affiliations of National Security League leaders, especially J. P. Morgan and others in the Morgan ambit, see C. Hartley Grattan, *Why We Fought* (New York: Vanguard Press, 1929) pp. 117–118, and Robert D. Ward, "The Origin and Activities of the National Security League, 1914–1919," *Mississippi Valley Historical Review,* 47 (June 1960): 51–65.
67. The Chamber of Commerce of the United States spelled out the long-run economic benefit of conscription, that for America's youth it would "substitute a period of helpful discipline for a period of demoralizing freedom from restraint." John Patrick Finnegan, *Against the Specter of a Dragon: The Campaign for American Military Preparedness, 1914–1917* (Westport, Conn.: Greenwood Press, 1974), p. 110. On the broad and enthusiastic support given to the draft by the Chamber of Commerce, see Chase C. Mooney and Martha E. Layman, "Some Phases of the Compulsory Military Training Movement, 1914–1920," *Mississippi Valley Historical Review* 38 (March 1952): 640.
68. Richard T. Ely, *Hard Times: The Way In and the Way Out* (1931), cited in Joseph Dorfman, *The Economic Mind in American Civilization* (New York: Viking, 1949), vol. 5, p. 671; and in Leuchtenburg, "The New Deal," p. 94.

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69. Ely drew up a superpatriotic pledge for the Madison chapter of the Loyalty Legion, pledging its members to "stamp out disloyalty." The pledge also expressed unqualified support for the Espionage Act and vowed to "work against La Follettism in all its anti-war forms." Rader, *Academic Mind*, pp. 183ff.
70. Gruber, *Mars and Minerva*, p. 207.
71. Ibid., pp. 208, 208n.
72. Ibid., pp. 209–210. In his autobiography, written in 1938, Richard Ely rewrote history to cover up his ignominious role in the get-La Follette campaign. He acknowledged signing the faculty petition, but then had the temerity to claim that he "was not one of the ring-leaders, as La Follette thought, in circulating this petition. . . ." There is no mention of his secret research campaign against La Follette.
73. For more on the anti-La Follette campaign, see H. C. Peterson and Gilbert C. Fite, *Opponents of War: 1917–1918* (Madison: University of Wisconsin Press, 1957), pp. 68–72; Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W. W. Norton, 1979), p. 120; and Belle Case La Follette and Fola La Follette, *Robert M. LaFollette* (New York: Macmillan, 1953), volume 2.
74. Thus, T. W. Hutchison, from a very different perspective, notes the contrast between Carl Menger's stress on the beneficent, unplanned phenomena of society, such as the free market, and the growth of "social self-consciousness" and government planning. Hutchison recognizes that a crucial component of that social self-consciousness is government statistics. T. W. Hutchison, *A Review of Economic Doctrines, 1870–1929* (Oxford: Clarendon Press, 1953), pp. 150–151, 427.
75. Fine, *Laissez-Faire*, p. 207.
76. Solomon Fabricant, *The Trend of Government Activity in the United States since 1900* (New York: National Bureau of Economic Research, 1952), p. 143. Similarly, an authoritative work on the growth of government in England puts it this way: "The accumulation of factual information about social conditions and the development of economics and the social sciences increased the pressure for government intervention. . . . As statistics improved and students of social conditions multiplied, the continued existence of such conditions was kept before the public. Increasing knowledge of them aroused influential circles and furnished working class movements with factual weapons." Moses Abramovitz and Vera F. Eliasberg, *The Growth of Public Employment in Great Britain* (Princeton: National Bureau of Economic Research, 1957), pp. 22–23, 30. Also see M. J. Cullen, *The Statistical Movement in Early Victorian Britain: The Foundations of Empirical Social Research* (New York: Barnes & Noble, 1975).
77. See Joseph Dorfman, "The Role of the German Historical School in American Economic Thought," *American Economic Review, Papers and Proceedings* 45 (May 1955), p. 18. George Hildebrand remarked on the inductive emphasis of the German Historical School that "perhaps there is, then, some connection between this kind of teaching and the popularity of crude ideas of physical planning in more recent times." George H. Hildebrand, "International Flow of Economic Ideas–Discussion," ibid., p. 37.
78. Dorfman, "Role," p. 23. On Wright and Adams, see Joseph Dorfman, *The Economic Mind in American Civilization* (New York: Viking Press, 1949), vol. 3, 164–174, 123; and Boyer, *Urban Masses*, p. 163. Furthermore, the first professor of statistics in the United States, Roland P. Falkner, was a devoted student of Engel's and a translator of the works of Engel's assistant, August Meitzen.
79. Irving Norton Fisher, *My Father Irving Fisher* (New York: Comet Press, 1956), pp. 146–147. Also for Fisher, see Irving Fisher, *Stabilised Money* (London: Allen & Unwin, 1935), p. 383.
80. Fisher, *My Fahter*, pp. 264–267. On Fisher's role and influence during this period, see Murray N. Rothbard, *America's Great Depression*, 4th ed. (New York: Richardson & Snyder, 1983).

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Also see Joseph S. Davis, *The World Between the Wars, 1919–39, An Economist's View* (Baltimore: Johns Hopkins University Press, 1975), p. 194; and Melchior Palyi, *The Twilight of Gold, 1914–1936: Myths and Realities* (Chicago: Henry Regnery, 1972), pp. 240, 249.

81. Wesley C. Mitchell was of old Yankee pietist stock. His grandparents were farmers in Maine and then in Western New York. His father followed the path of many Yankees in migrating to a farm in northern Illinois. Mitchell attended the University of Chicago, where he was strongly influenced by Veblen and John Dewey. Dorfman, *Economic Mind,* vol. 3, 456.
82. Dorfman, *Economic Mind,* vol. 4, 376, 361.
83. Emphasis added. Lucy Sprague Mitchell, *Two Lives* (New York: Simon and Schuster, 1953), p. 363. For more on this entire topic, see Murray N. Rothbard, "The Politics of Political Economists: Comment," *Quarterly Journal of Economics* 74 (November 1960): 659–665.
84. See in particular James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968); and Samuel P. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," *Pacific Northwest Quarterly* 59 (October 1964), pp. 157–169.
85. David Eakins, "The Origins of Corporate Liberal Policy Research, 1916–1922: The Political-Economic Expert and the Decline of Public Debate," in Israel, ed., *Building the Organizational Society,* p. 164.
86. Herbert Heaton, *Edwin F. Gay, A Scholar in Action* (Cambridge: Harvard University Press, 1952). Edwin Gay was born in Detroit of old New England stock. His father had been born in Boston and went into his father-in-law's lumber business in Michigan. Gay's mother was the daughter of a wealthy preacher and lumberman. Gay entered the University of Michigan, was heavily influenced by the teaching of John Dewey, and then stayed in graduate school in Germany for over a dozen years, finally obtaining his Ph.D. in econmic history at the University of Berlin. The major German influences on Gay were Gustav Schmoller, head of the Historical School, who emphasized that economics must be an "inductive science," and Adolf Wagner, also at the University of Berlin, who favored large-scale government intervention in the economy in behalf of Christian ethics. Back at Harvard, Gay was the major single force, in collaboration with the Boston Chamber of Commerce, in pushing through a factory inspection act in Massachusetts, and in early 1911 Gay became president of the Massachusetts branch of the American Association for Labor Legislation, an organization founded by Richard T. Ely and dedicated to agitating for government intervention in the area of labor unions, minimum wage rates, unemployment, public works, and welfare.
87. On the pulling and hauling among Rockefeller advisers on the Institute, see David M. Grossman, "American Foundations and the Support of Economic Research, 1913–29," *Minerva* 22 (Spring-Summer 1982): 62–72.
88. See Eakins, "Origins," pp. 166–167; Grossman, "American Foundations," pp. 76–78; Heaton, *Edwin F. Gay.* On Stone, see Dorfman, *Economic Mind,* vol. 4, 42, 60–61; and Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era 1890–1920* (Chicago: University of Chicago Press, 1964), pp. 152, 165. During his Marxist period, Stone had translated Marx's *Poverty of Philosophy.*
89. See Guy Alchon, *The Invisible Hand of Planning: Capitalism, Social Science, and the State in the 1920's* (Princeton: Princeton University Press, 1985), pp. 54ff.
90. Collier and Horowitz, *The Rockefellers,* p. 140.
91. Eakins, "Origins," p. 168. Also see Furner, *Advocacy and Objectivity,* pp. 282–286.
92. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982), pp. 187–188.
93. Vice-chairman of the IGR was retired St. Louis merchant and lumberman and former president of Washington University of St. Louis, Robert S. Brookings. Secretary of the IGR was James F. Curtis, formerly Assistant Secretary of the Treasury under Taft and now secretary and deputy governor of the New York Federal Reserve Bank. Others on the board of the IGR were ex-President Taft; railroad executive Frederick A. Delano, uncle of Franklin D. Roosevelt and

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member of the Federal Reserve Board; Arthur T. Hadley, economist and president of Yale; Charles C. Van Hise, progressive president of the University of Wisconsin, and ally of Ely; reformer and influential young Harvard Law professor, Felix Frankfurter; Theodore N. Vail, chairman of A.T. & T.; progressive engineer and businessman, Herbert C. Hoover; and financier R. Fulton Cutting, an officer of the New York Bureau of Municipal Research. Eakins, "Origins," pp. 168–169.

94. On the Commercial Economy Board, see Grosvenor B. Clarkson, *Industrial America in the World War: The Strategy Behind the Line, 1917–1918* (Boston: Houghton Mifflin, 1923), pp. 211ff.
95. Alchon, *Invisible Hand,* p. 29. Mitchell headed the price statistics section of the Price-Fixing Committee of the War Industries Board.
96. Heaton, *Edwin Gay,* p. 129.
97. See Rothbard, "War Collectivism," pp. 100–112.
98. See Heaton, *Edwin Gay,* pp. 129ff; and the excellent book on the Inquiry, Lawrence E. Gelfand, *The Inquiry: American Preparations for Peace, 1917–1919* (New Haven: Yale University Press, 1963), pp. 166–168, 177–178.
99. Heaton, *Edwin Gay,* p. 135. Also see Alchon, *Invisible Hand,* pp. 35–36.
100. In 1939 the Bureau of the Budget would be transferred to the Executive Office, thus completing the IGR objective.
101. Moulton was a professor of economics at the University of Chicago, and vice-president of the Chicago Association of Commerce. See Eakins, "Origins," pp. 172–177; Dorfman, *Economic Mind,* vol. 4, 11, 195–197.
102. Gay had been recommended to the group by one of its founders, Thomas W. Lamont. It was Gay's suggestion that the CFR begin its major project by establishing an "authoritative" journal, *Foreign Affairs.* And it was Gay who selected his Harvard historian colleague Archibald Cary Coolidge as the first editor and the *New York Post* reporter Hamilton Fish Armstrong as assistant editor and executive director of the CFR. See Lawrence H. Shoup and William Minter, *Imperial Brain Trust: The Council on Foreign Relations and United States Foreign Policy* (New York: Monthly Review Press, 1977), pp. 16–19, 105, 110.
103. Ellis W. Hawley, "Herbert Hoover and Economic Stabilization, 1921–22," in E. Hawley, ed., *Herbert Hoover as Secretary of Commerce: Studies in New Era Thought and Practice* (Iowa City: University of Iowa Press, 1981), p. 52.
104. Hawley, "Herbert Hoover," p. 53. Also see ibid., pp. 42–54. On the continuing collaboration between Hoover, Gay, and Mitchell throughout the 1920s see Alchon, *Invisible Hand.*
105. Alchon, *Invisible Hand,* pp. 39–42; Dorfman, *Economic Mind,* vol. 3, 490.
106. One exception was the critical review in the *Commercial and Financial Chronicle* (May 18, 1929), which derided the impression given the reader that the capacity of the United States "for continued prosperity is well-nigh unlimited." Quoted in Davis, *World Between the Wars,* p. 144. Also on *Recent Economic Changes* and economists' opinions at the time, see ibid., pp. 136–151, 400–417; David W. Eakins, "The Development of Corporate Liberal Policy Research in the United States, 1885–1965," Ph.D. diss., doctoral dissertation University of Wisconsin, 1966), pp. 166–169, 205; and Edward Angly, comp., *Oh Yeah?* (New York: Viking Press, 1931).
107. In 1930, Hunt published a book-length, popularizing summary, *An Audit of America.* On *Recent Economic Changes,* also see Alchon, *Invisible Hand,* pp. 129–133, 135–142, 145–151, 213.
108. *Department of Labor—FSA Appropriation Bill for 1945.* Hearings Before the Subcommittee on Appropriations. 78th Congress, 2nd Session, Part I (Washington, 1945), pp. 258f., 276f. Quoted in Rothbard, "Politics of Political Economists," p. 665. On the growth of economists and statisticians in government, especially during wartime, see also Herbert Stein, "The Washington Economics Industry," *American Economic Association Papers and Proceedings* 76 (May 1986), pp. 2–3.

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